Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-...73-1627

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Petitioner,

against

LEON NEWSOME,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Petitioner Pro Se
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3394

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ROBERT S. HAMMER
Assistant Attorney General
of Counsel

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In the

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OCTOBER TERM, 1973

No. 73-.....

Louis J. Lefkowitz, Attorney General of the State of New York,

Petitioner,

against

Leon Newsome,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Louis J. Lefkowitz, Attorney General of the State of New York, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered herein on January 28, 1974.

Opinions Below

Both the opinion of the Court of Appeals and the memorandum and order of the District Court for the Eastern District of New York are not yet reported. They appear in the appendix beginning at pages 1a and 3a, respectively.

Jurisdiction

The judgment of the Court of Appeals was entered on January 28, 1974. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Does a state defendant's plea of guilty waive federal habeas corpus review of his conviction, even though under state law, he has been permitted review in the state appellate courts of the denial of his motion, on constitutional grounds, to suppress the evidence that would have been offered against him had there been a trial?

2. Assuming question "1" is answered in the affirmative is N.Y. Penal Law § 240.35(6) constitutional?

Statutory Provisions Involved

28 U.S.C. § 2241(c) provides in pertinent part:

> "The writ of habeas corpus shall not extend to a person unless—
>
> • • •
>
> "(3) He is in custody in violation of the Constitution or law or treaties of the United States; • • •"

N.Y. Penal Law § 240.35 provides in pertinent part:

> "A person is guilty of loitering when he
>
> • • •
>
> (6) Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonable credible account of his conduct and purposes; • • •"

McKinney's Consolidated Laws of New York, Vol. 39, page 166.

Statement of the Case

Respondent was arrested for loitering, N.Y. Penal Law § 240.35(6), in the lobby of a New York City Housing Authority building at 10:20 p.m. on February 12, 1970 after Housing Authority police were informed by an anonymous tenant that there was a suspicious person in the hallway.

A search of respondent's person made at the time of the arrest revealed a set of "works", so that he was also charged in the Criminal Court of the City of New York, County of Queens with possession of a dangerous drug, fourth degree, *id.*, § 220.05, and criminally possessing a hypodermic instrument, *id.*, § 220.45, both Class A misdemeanors carrying a maximum of one year's imprisonment.

The arresting officer testified at a pre-trial hearing that he had briefly observed respondent in the lobby. When approached by the officer and asked what he was doing, respondent replied, "I am not doing anything", claiming to have just arrived. He was unable to produce any identification. His arrest and search followed.

Respondent was found guilty of loitering and the motion to suppress was denied. The Court rejected the claim that the arrest for loitering was made without probable cause and that the statute was unconstitutional.

On May 7, 1970, respondent pleaded guilty to attempted possession of drugs and hypodermic charges. He was sentenced to 90 days imprisonment. He received an unconditional discharge on the loitering conviction.

Respondent never served the jail sentence. A certificate of reasonable doubt was issued pursuant to former N.Y. Code of Crim. Pro. § 527 and petitioner was enlarged on $100 cash bail pending appeal. He has remained at large ever since.

An appeal was taken to the Appellate Term of the Supreme Court, Second and Eleventh Judicial Districts. On June 21, 1971 the judgment of the Criminal Court was modified by reversing the loitering conviction on the grounds of insufficient evidence and a defective information. However, the search incident to the loitering arrest which yielded the contraband was upheld on the basis that probable cause had existed to arrest respondent on that charge.

On July 14, 1971, leave to appeal to the New York Court of Appeals was denied by Hon. Charles D. Breitel, Associate Judge. Certiorari was denied sub nom. *Newsome* v. *New York*, 405 U.S. 908 (1972). The instant proceeding was then commenced in the District Court.

The named respondents never appeared. In view of his duty to defend the constitutionality of state statutes, N.Y. Executive Law § 71, the Attorney General of the State of New York requested and was granted leave to intervene as a respondent.*

On May 23, 1972, the District Court dismissed the petition for a writ of habeas corpus for lack of jurisdiction on the ground that petitioner was not in custody within the meaning of 28 U.S.C. § 2241. A certificate of probable cause, leave to proceed *in forma pauperis* and assigned counsel were granted by the Court of Appeals. The case was held pending the decision of this Court in *Hensly* v.

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* The opinion of the Court of Appeals erroneously states at page 7a that the petitioner appeared in this proceeding for the first time before that Court. In fact, he had intervened and appeared at all state appellate proceedings as well as in the District Court.

Municipal Court, 411 U.S. 345 (1973) and remanded in the light of that ruling.

On July 12, 1973, the District Court granted petitioner's application for a writ of habeas corpus. The decision was based upon the fact that the contraband was seized incidental to an arrest on a charge of loitering, N.Y. Penal Law § 240.35(6),* which was held unconstitutional in *People* v. *Berck*, 32 N Y 2d 567; *cert. den. sub nom.: New York* v. *Berck*, 414 U.S. ——, # 73-581, 42 U.S. Law Week 3352 (Dec. 10, 1973).

On appeal, the judgment of the District Court was affirmed. In its decision, the Court of Appeals adhered to its earlier rulings that federal habeas corpus was available to one in respondent's position whose conviction was based on a plea of guilty (7-11a). It also held N.Y. Penal Law § 240.35(6) unconstitutional, basing its decision largely upon that of the New York Court of Appeals in the *Berck* case (11-17a).

Reasons for Granting the Writ

I.

By permitting a state defendant convicted on a plea of guilty to maintain a proceeding for federal habeas corpus unrelated to the plea itself, merely on the strength of having been permitted a limited right of appeal in the state courts, the Court of Appeals has decided an important question of federal law either contrary to the applicable decisions of this Court or has decided a question which heretofore has not, but should be decided by this Court. The decision below also conflicts with that of *Mann* v. *Smith*, 488 F. 2d 245 (9th Cir. 1973), cert. den. —— U.S. ——, 42 U.S. Law Week 3469 (Feb. 19, 1974).

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* The decision (apparently through clerical oversight) erroneously states that petitioner was convicted of loitering.

This Court has consistently held that one who pleads guilty to a crime lacks standing to raise anything on post conviction review except the validity of the plea itself. *Tollett* v. *Henderson*, 411 U.S. 258 (1973); *Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970); *Parker* v. *North Carolina*, 397 U.S. 790 (1970); and *North Carolina* v. *Alford*, 400 U.S. 25 (1970). This Court has recognized that a plea of guilty is

> "more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a judge or jury."

Brady v. *United States*, *supra*, 397 U.S. at 748.

Most recently in *Tollett* v. *Henderson*, *supra*, this Court declared:

> "We thus reaffirm the principle recognized in the *Brady* trilogy; a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*" (411 U.S. at 26).

It is recognized that when the Second Circuit took a contrary position in such cases as *United States ex rel. Rogers* v. *Warden*, 381 F. 2d 209, 214-15 (2d Cir. 1967); *United States ex rel. Molloy* v. *Follette*, 391 F. 2d 231, 232 (2d Cir. 1968), this Court had not yet decided the

Henderson, *Brady*, *Richardson*, *Parker* and *Alford* cases, *supra*. However, its continued adherence to this doctrine as illustrated by its decisions in *United States ex rel. Stephen J. B.* v. *Shelley*, 430 F. 2d 215, 217 f.n. 3 (2d Cir. 1970) wherein it misconstrued this Court's opinion in *Richardson* at 397 US at 773, f.n. 13 and the instant case is, we submit, a serious deviation from the authoritative decisions of this Court.*

On the other hand, if the Court of Appeals was correct in distinguishing *Tollett* v. *Henderson*, *supra*, on the ground that Tennessee law made no provision for the preservation of constitutional claims after a defendant has pleaded guilty (10a), then new ground has indeed been broken which merits full scrutiny by this Court.

Even if New York and California law does not reflect a future trend in the law throughout the United States the issue presented herein is sufficiently significant of itself to warrant review by this Court for the purpose of resolving the conflict between the Second and Ninth Circuit presented by the instant case and that of *Mann* v. *Smith*, *supra*.

In an attempt to distinguish the *Mann* case, the Second Circuit decision makes light of its differences with the Ninth Circuit, characterizing them as dictum, because of Mann's resort to extraordinary writ rather than appeal, p. 10a, f.n. 9. However, a close reading of *Mann* demonstrates, beyond doubt, that the majority considered the form of post-conviction review to be immaterial; it specifically rejected the decisions of the Second Circuit which were relied upon by the dissenting judge and held itself to be bound by *Tollett* v. *Henderson*, see 488 F. 2d at 247.

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* The Second Circuit also overlooked the fact that respondent is not even a proper party to raise the issue of the constitutionality of N.Y. Penal Law § 240.35(6), since the Appellate Term reversed that conviction holding in his favor on non-constitutional grounds. Thus there was not even a live controversy presented by this constitutional claim, *Golden* v. *Zwickler*, 394 U.S. 103 (1969).

One cannot conclude without pointing to the other ill effects of the decision below:

First, while it permits New York defendants such as respondent to maintain a habeas corpus proceeding, the Second Circuit has continued to strictly adhere to this Court's ruling with respect to both federal, *Santana* v. *United States*, 477 F. 2d 721, 722 (2d Cir. 1973) and other state, *Bergin* v. *MacDougall*, 432 F. 2d 935 (2d Cir. 1970) convictions. Therefore, it is anomalous, to say the least, that it should have carved out a special federal habeas corpus law exception for New York defendants based upon a procedural right which exists solely as a matter of state law. Cf. *McMann* v. *Richardson, supra*, 397 U.S. at 766.

Second, in enacting former N.Y. Code of Crim. Pro. § 813-c [now N.Y. Crim. Pro. Law § 710.70(2)] the New York Legislature never intended to, indeed, could not constitutionally affect a person's entitlement to federal habeas corpus. Such a result should not be achieved by judicial construction, *Rogers, supra*, 381 F. 2d at 214-15. Even if collateral relief is barred to a defendant, direct review in the Supreme Court of the state appellate court's rulings remains a possibility, 28 U.S.C. § 1257, and was sought in the instant case, *Newsome* v. *New York, supra*.

In its continued adherence to the policy expressed in the *Rogers, Molloy* and *Stephen J.B.* cases, the Second Circuit has done violence to "the beneficent and enlightened statute" [§ 813-c] and has sprung a "trap" on the State of New York, see *Stephen J.B., supra*, 430 F. 2d at 217-18, f.n. 3.

II.

The instant case also presents the issue, not heretofore decided by this Court, whether the State may constitutionally prevent "inchoate crime" by arresting and removing from the scene and, where necessary, searching persons who, the objective circumstances indicate, are loitering for

the purpose of committing illegal acts, but have not done anything rising to the level of an attempt to commit a crime.

This Court has held that a properly drawn loitering statute is constitutional. *Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 91 (1965). However, in the last few years, it has struck down various State loitering laws for being unconstitutionally vague. *Palmer* v. *City of Euclid*, 402 U.S. 544 (1971). *Coates, et al.* v. *City of Cincinnati*, 402 U.S. 611 (1971), *Papachristou* v. *Jacksonville*, 405 U.S. 156 (1972), and *Smith* v. *Florida*, 405 U.S. (1972). Although the statutes involved in those cases differ significantly in scope and approach from the New York loitering statute, the effect of these decisions is to render uncertain the state of the law in an area which is vital to modern police work.

To date, this Court has only dealt either with statutes which punished mere "hanging around", *Palmer* v. *City of Euclid, supra*, 402 U.S. at 544, as have other lower federal and state courts.*

With all respect to the learned opinions of the Court below and the majority in *People* v. *Berck, supra*, we would submit that the statute can be construed so as to conform to this Court's probable cause test set down in *Sibron* v. *New York*, 392 U.S. 42, 61-62 (1968); and this Court's rul-

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* See *Anderson* v. *Nemetz*, 474 F. 2d 814 (9th Cir. 1973); *United States* v. *Hall*, 459 F. 2d 831 (D.C. Cir. 1972); *Ricks* v. *District of Columbia*, 414 F. 2d 1097 (D.C. Cir. 1968); *Kirkwood* v. *Loeb*, 323 F. Supp. 611, 616 (W.D. Tenn. 1971); *Scott* v. *District Attorney, Jefferson Parish*, 309 F. Supp. 833 (E.D. La. 1970); *State* v. *Starks*, 186 N.W. 2d 245 (Wisc. 1971); *Baker* v. *Binder*, 274 F. Supp. 658 (W.D. Ky. 1967); other cases have dealt with laws similar to the vagrancy statute voided in *Fenster* v. *Leary*, 20 N Y 2d 309, 229 N.E. 2d 426; 282 N.Y.S. 2d 739 (1967). *United States* v. *Kilgen*, 431 F. 2d 627 (5th Cir. 1970); or a combination of two, *State* v. *Grahovac*, 480 P. 2d 148 (Hawaii, 1970); *Arnold* v. *City and County of Denver*, 464 P. 2d 515 (Colo. 1970).

ing that a trained police officer is permitted to draw reasonable inferences from a person's conduct, as in this case, where it is clear to any reasonable person that petitioner was up to no good, *Terry* v. *Ohio*, 392 U.S. 1, 23 (1968). This is underscored by this Court's recent decision in *Lewis* v. *City of New Orleans*, —— U.S. ——, 42 U.S. Law Week 4241, 4242 (Feb. 19, 1974) in which it recognized that an otherwise unconstitutional statute might be saved by a limiting construction.

CONCLUSION

For the above reasons certiorari should be granted.

Dated: New York, New York, April 23, 1974.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Petitioner, Pro Se

Samuel A. Hirshowitz
First Assistant Attorney General

Robert S. Hammer
Assistant Attorney General
of Counsel

APPENDIX A

Memorandum and Order of the District Court.

72 C 453

July 12, 1973

UNITED STATES DISTRICT COURT

Eastern District of New York

United States of America, ex rel. Leon Newsome,
Petitioner,

against

Bernard J. Malcom, New York City Commissioner of Correction, John J. Cunningham, Warden, New York City Correctional Center for Men, Richard Newhall, Deputy Warden, Queens Court Detention Pens,
Respondents,

Louis J. Lefkowitz Attorney General of the State of New York,
Intervenor-Respondent.

Memorandum and Order

Bruchhausen, D. J.

The petitioner applies for a writ of habeas corpus. He challenges the constitutionality of the State statute, which he was convicted of violating.

This Court by its memorandum and order dated May 23, 1972 dismissed the petition on the ground that the peti-

Memorandum and Order of the District Court.

tioner was not in custody within the meaning of the Habeas Corpus Statute, 28 U. S. C. 2241.

The Circuit Court of Appeals for the Second Circuit, by order dated April 26, 1973 remanded the action for a decision on the merits.

Thereafter, the Court of Appeals of the State of New York handed down its opinion in the case of The People & C., respondent v. Alan Berek, decided July 2, 1973 held that Section 240.35 (6)—Loitering is unconstitutional, that the conviction should be reversed and the complaint dismissed.

It follows, therefore, that the writ should issue.

It is so ordered.

Copies hereof have been forwarded to the attorneys for the parties.

WALTER BRUCHHAUSEN
Senior U. S. D. J.

APPENDIX B

Decision of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 693—September Term, 1973.

(Argued January 11, 1974 Decided January 28, 1974.)

Docket No. 73-2413

UNITED STATES OF AMERICA ex rel.
LEON NEWSOME,

Petitioner-Appellee,

v.

BENJAMIN J. MALCOLM, New York City Commissioner of Correction, JOHN J. CUNNINGHAM, Warden, New York City Correctional Center for Men, RICHARD NEWHALL, Deputy Warden, Queens Court Detention Pens,

Respondents,

LOUIS J. LEFKOWITZ, Attorney General
of the State of New York,

Intervenor-Respondent-Appellant.

Before:

KAUFMAN, *Chief Judge,*
SMITH and FEINBERG, *Circuit Judges.*

Appeal from an order granting a petition for a writ of habeas corpus, pursuant to 28 U.S.C. 2254, entered in the United States District Court for the Eastern District of New York, Walter Bruchhausen, *Judge.*

Affirmed.

ROBERT S. HAMMER, Assistant Attorney General of the State of New York (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, on the brief), *for Intervenor-Respondent-Appellant.*

STANLEY NEUSTADTER, New York, New York (William J. Gallagher, The Legal Aid Society, on the brief), *for Petitioner-Appellee.*

KAUFMAN, *Chief Judge:*

This appeal presents the rare instance where by granting a writ of habeas corpus to a state prisoner we intrude less into local administration of criminal justice than if we were to follow the contrary course suggested by the state Attorney General. Judge Bruchhausen granted Leon Newsome's petition pursuant to 28 U.S.C. 2254 because the loitering statute under which Newsome was arrested has been declared unconstitutional by the New York Court of Appeals. Since Newsome is collaterally attacking a conviction not for loitering, but for a narcotics violation arising from evidence seized at the time of his arrest for loitering, his petition raises an interesting question of Fourth Amendment law. We agree with the New York Court of Appeals in its evaluation of the loitering statute and, because of the particular constitutional infirmities involved, are compelled to conclude that the writ should issue. We affirm.

I. FACTUAL BACKGROUND

The essential facts are not in dispute and can be related briefly. On February 12, 1970, New York City Housing Authority Policeman Warren J. Ungar and a fellow officer

responded to an anonymous telephone call "to the effect that someone was in the hallway" of a City Housing Authority dwelling at 81-03 Hammel Boulevard, Queens, New York. The patrolmen entered the building at approximately 10:20 p.m. and immediately approached two men—Leon Newsome and an unidentified companion—who were standing in the lobby near the main doorway. In response to Ungar's questions, Newsome said he had just entered the building. When Newsome was unable to produce identification, he was arrested for loitering (N.Y. Pen. L. 240.35(6)) and searched incident to that arrest. Patrolman Ungar placed Newsome against the wall and "went through the pockets." This search produced a closed black leather pouch in which Ungar found a functional hypodermic instrument and a glassine envelope later determined to contain 2 grains of heroin. Accordingly, Newsome was also charged with possession of dangerous drugs (N.Y. Pen. L. 220.05) and criminal possession of a hypodermic instrument (N.Y. Pen. L. 220.45).

After a brief nonjury trial before Criminal Court Judge Nicholas Tsoucalas on April 7, 1970, Newsome was convicted for loitering. Judge Tsoucalas immediately proceeded to conduct a hearing on Newsome's motion to suppress the evidence seized at the time of his arrest.[1] Newsome raised and Judge Tsoucalas rejected the same claims at trial and on the motion to suppress: that the patrolmen did not have probable cause to arrest Newsome for loitering and that the loitering statute was unconstitutional and could not therefore serve as the basis for searches incident to arrests.

On May 7, 1970, the date scheduled for a trial on the drug charges, Newsome appeared before Judge Abraham Roth and withdrew his prior pleas of not guilty and pleaded guilty to the lesser charge of "attempted possession

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[1] Patrolman Ungar was the only witness at the loitering trial and the suppression hearing.

of dangerous drugs" (N.Y. Pen. L. 110(6)). He was sentenced immediately to 90 days in the City Reception Center, and received an unconditional release for the loitering conviction. The minutes of the May 7 proceedings clearly disclose Newsome's intention to appeal both the loitering conviction and, pursuant to N.Y. Code. Crim. P. 813-c,[2] the denial of his motion to suppress. Indeed, at the close of proceedings on May 7, Judge Roth granted a certificate of reasonable doubt (N.Y. Code. Crim. P. 527) because "there is a question of law involved here, very serious question of law, with regard to the loitering charge." On direct appeal to the Appellate Term, the loitering conviction was reversed for insufficient evidence; but, because the court found that probable cause existed to arrest Newsome for loitering, the search incident to that arrest was held valid and the drug conviteion affirmed.[3] Leave to appeal to the New York Court of Appeals was denied and a petition for a writ of certiorari was denied *sub nom. Newsome* v. *New York*, 405 U.S. 908 (1972). The instant petition for a writ of habeas corpus was filed on April 6, 1972,[4] just five days before Newsome was to begin serving his 90 day sentence (imposition of which had been stayed pending appeal).[5]

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[2] Presently codified as N.Y. Crim. Proc. L. 710.70(2).

[3] The Appellate Term disposed of Newsome's appeal by issuing a summary order which is silent on the constitutional claims.

[4] Although Newsome has not pursued state avenues of collateral attack, his federal claims were presented to the state courts on direct appeal. He has, therefore, satisfied the exhaustion requirement, *Picard* v. *Connor*, 404 U.S. 270, 275 (1971), and the state makes no claim to the contrary.

[5] On May 23, 1972, Judge Bruchhausen dismissed the petition because Newsome was not "in custody" as required by 28 U.S.C. 2241. On appeal, we remanded by summary order (April 26, 1973) (72-1875) for a disposition on the merits, in light of the Supreme Court's holding on the custody question in *Hensley* v. *Municipal Court*, 411 U.S. 345 (1973).

On July 2, 1973, prior to Judge Bruchhausen's final disposition on the merits, the New York Court of Appeals in a well-reasoned opinion declared § 240.35(6) unconstitutional on its face because, among other infirmities, it was overly vague. *People* v. *Berck*, 32 N.Y.2d 567, 347 NYS2d 33 (1973), *cert. denied sub nom. New York* v. *Berck*, 42 U.S.L.W. 3352 (Dec. 11, 1973). On July 12, 1973, Judge Bruchhausen granted the writ.[6] The New York State Attorney General, who had not appeared in prior proceedings in this case, requested and was granted leave to intervene as a respondent on the present appeal.

II. Standing

As a threshold issue, the Attorney General raises the not unfamiliar claim that Newsome is without standing to pursue his underlying constitutional attacks on the drug conviction because those claims were waived when Newsome pleaded guilty. Ordinarily, it is true that an intelligent and voluntary guilty plea waives a defendant's right to trial and all claims of constitutional infirmities in the prosecution, which could have been raised at trial. *Tollett* v. *Henderson*, 411 U.S. 258 (1973); *McMann* v. *Richardson*, 397 U.S. 759 (1970); *Brady* v. *United States*, 397 U.S. 742 (1970).[7] But in *McMann* v. *Richardson*, the Supreme Court noted that an exception to the general waiver rule exists

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[6] Apparently because of a clerical error, Judge Bruchhausen's memorandum and order incorrectly indicate that Newsome is attacking a conviction for loitering. As noted above, the loitering conviction was vacated by the Appellate Term and the instant petition attacks the drug conviction.

[7] After a defendant pleads guilty on advice of counsel, "[t]he focus of federal habeas inquiry is the nature of the advice, and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity." *Tollett* v. *Henderson, supra*, 411 U.S. at 266.

where state law permits a defendant to retain his collateral claims after pleading guilty. 397 U.S. at 766. New York is one of those states which permit a defendant to appeal specified adverse pretrial rulings even though he subsequently pleads guilty. The operative statutory provision at the time Newsome pleaded guilty was N.Y. Code Crim. P. 813-c, which stated: "the order denying a motion to suppress evidence may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty."

We have characterized the New York procedure as "enlightened" for it permits a defendant whose sole defense is one of the specified constitutional claims, neither to suffer nor impose on the state the burden of going to trial simply to preserve his claim—a procedure which precipitated the enactment of § 813-c.* *See United States ex rel. Rogers* v. *Warden*, 381 F.2d 209, 214 (2d Cir. 1967). This new procedural device manifested obvious legislative determinations that trials are not to be encouraged in order to preserve a ground for appeal and that guilty pleas in such cases would aid in avoiding additions to beleaguered trial calendars. Accordingly, the rule in this circuit is well established that a New York defendant who has utilized § 813-c in the state courts may pursue his constitutional claim on a federal habeas corpus petition, for "it would be anomalous if a defendant by scrupulously following a sanctioned and reasonable state procedure for preserving his federal constitutional claims on appeal in state courts, simultaneously waived his right to present these same claims to a federal court . . . because he was lulled into following state procedures." *Id.* at 214-15. *See United States ex rel. Stephen J.B.* v. *Shelly*, 430 F.2d 215, 217

* A companion section, 813-g, (presently codified as N.Y. Crim. Proc. L. 710.20(3), 710.70(2)) permitted similar appeal from the denial of a motion to suppress an allegedly coerced confession.

& n. 3 (2d Cir. 1970); *United States ex rel. Molloy* v. *Follette*, 391 F.2d 231 (2d Cir. 1968).

The Attorney General, despite our clear pronouncements on the issue, contends again, as he did in *Molloy* and *Stephen J.B.*, that we should abandon the rule first announced in *Rogers* and close the avenue of federal habeas to state petitioners who have entered pleas of guilty under the circumstances we have recounted. Again, we reject this argument and reaffirm our view that where state law permits a defendant to plead guilty without forfeiting his appeals on collateral constitutional claims, it would be a trap to the unwary if a defendant who waived his right to trial in reliance on the state appeal procedures was thereafter precluded from pressing his federal constitutional claims in the district court. We believe, moreover, that were we to nullify the vitality of § 813-c and similar statutes for federal habeas purposes, most defendants with competent counsel would be dissuaded from pleading guilty and instead would proceed to trial for the sole purpose of preserving claims for potential vindication on state review or federal habeas. The New York legislature passed § 813-c to prevent precisely this eventuality and federal courts should be reluctant to interefere with a state's administration of criminal justice, particularly when the result would be to add to its already congested criminal trial calendars. Accordingly, we refrain from confronting the state courts with a problem the legislature has attempted to ameliorate. We are of the view that the more appropriate forum for the Attorney General to express his dissatisfaction with § 813-c is the state legislature, not the federal courts.

As a final attack on our *Rogers-Molloy-Stephen J.B.* line of cases, the Attorney General contends that *Tollett* v. *Henderson, supra*, precludes all state prisoners who pleaded guilty from asserting collateral constitutional claims in federal habeas petitions—notwithstanding state

procedures which allow the defendant to retain those claims for purposes of *state* post-conviction remedies. In our view, *Tollett* does not stand for this proposition. In *Tollett* a Tennessee prisoner attacked his 25 year old conviction (entered after a guilty plea) for first degree murder on the ground that blacks were systematically excluded from the grand jury that indicted him. Tennessee had no procedure analogous to § 813-c for preserving constitutional claims after pleading guilty. The Supreme Court held that:

> after a criminal defendant pleads guilty on the advice of counsel he is not automatically entitled to federal collateral relief on proof that the indicting grand jury was unconstitutionally selected. The focus of federal habeas inquiry is the nature of the advice and voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity.

411 U.S. at 266. To be sure, *Tollett* did not mention the exception cut out in *McMann*, and to which we have referred, for states which provide for the preservation of constitutional claims, but given the absence of this type of provision in Tennessee law, that question was not before the court in *Tollett* and repetition of the principle would have been superfluous. Accordingly, we refuse to undertake the hazardous task of elevating silence to the level of *stare decisis*.[9] When, as here, a defendant enters

[9] A split panel of the Ninth Circuit has apparently concluded that the exception noted in *McMann* has not survived *Tollett*. *Mann* v. *Smith* (9th Cir. July 9, 1973) (71-1932) slip op. *petition for cert. pending* 42 U.S.L.W. 3363 (Dec. 18, 1973). The language to this effect in the *Mann* majority opinion must be considered dicta, however, since the petitioner had not in fact availed himself of state post-plea appellate procedures. *Mann, supra*, at 2 n. 1. The court commented that the failure to appeal in state court cou-

(footnote continued on following page)

a plea of guilty and then follows acknowledged state procedures for preserving his claims, the guilty plea does not act as an automatic waiver.

III. Constitutionality of New York's Loitering Statute

Section 240.35(6) provides:

> A person is guilty of loitering when he: . . . Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes. . . .

We have noted that the New York Court of Appeals has already declared this provision unconstitutional on its face. *People* v. *Berck, supra.* In the instant proceeding, the Attorney General urges us, in effect, to instruct the state's highest court that its evaluation of a state statute was erroneous. Since the state court grounded its decision on the federal rather than the state Constitution, we must make an independent determination of the applicable federal standards. *See Townsend* v. *Sain*, 372 U.S. 293, 318 (1963). Accordingly, the question before us on this application for federal habeas corpus relief is whether the section violates due process. We conclude that it does.

(footnote continued from preceding page)

pled with an apparent plea bargain was "more consistent with a relinquishment of his Fourth Amendment claims than an attempt to preserve them." *Id.* Although we do not agree with the Ninth Circuit's reading of *Tollett's* impact on *McMann*, our holding is not inconsistent with the determination that a defendant who fails to invoke available state procedures will not automatically benefit on federal habeas from the mere existence of those procedures.

When § 240.35(6) became effective on September 1, 1967, it represented New York's formulation of a dragnet approach to the maintenance of public order that had its roots in feudal England and which has survived, despite considerable disapproval, in urban America. Originally conceived as a method to keep unemployed laborers from wandering between towns and terrorizing travelers, laws against vagrancy and loitering have been transformed into devices for preventing crime and for removing so-called nuisances—mobs and individual "undesirables"—from public places.[10] Despite the obvious governmental interest in preserving public order, a vagrancy-loitering statute will run afoul of the Constitution when its necessarily broad scope is stated in language so indefinite that it fails to:

> "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States* v. *Harriss*, 347 U.S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. *Thornhill* v. *Alabama*, 310 U.S. 88; *Herndon* v. *Lowry*, 301 U.S. 242.

Papachristou v. *Jacksonville*, 405 U.S. 156, 162 (1972). Moreover, because the crime prevention components of loitering statutes are aimed at suspected or potential rather than incipient or observable conduct, they may conflict with the deeply rooted Fourth Amendment requirement that arrests must be predicated on probable cause. *Beck* v. *Ohio*, 379 U.S. 89 (1964); *Henry* v. *United States*, 361 U.S. 98 (1959). *See Papachristou* v. *Jacksonville*, *supra*; *Palmer* v. *Euclid*, 402 U.S. 544 (1971). Indeed, it has been suggested that:

> because the elements of the . . . offense are obscure, even officers engaged in its good faith enforcement cannot gauge justification for . . . arrests consistently with Fourth Amendment principles.

Hall v. *United States*, 459 F.2d 831, 837 (D.C. Cir. 1972) (en banc).

Turning from our brief discussion of the history and purposes of vagrancy legislation to the specific statute in issue, we must scrutinize the New York statute in accordance with the standard enunciated in *Papachristou*, *Palmer*, and *Smith* v. *Florida*, 405 U.S. 172 (1972). Under the first prong of the vagueness test (*Papachristou* v. *Jacksonville*, *supra*, 405 U.S. at 162, *quoting*, *United States* v. *Harriss*, *supra*, 347 U.S. at 617) we must determine whether the statute's prohibitions are cast in terms sufficiently precise to give a reasonably intelligent person notice of the conduct that is proscribed. *See Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939). Newsome contends that the operative language is so indefinite that even a citizen who had "read and studied" the statute in an effort to regulate his behavior would be in a quandary. He suggests, moreover, that the linguistic imprecision is exacerbated because § 240.35(6) imposes criminal liability in the absence of criminal intent, a factor noted by the Supreme Court in *Papachristou*, 405 U.S. at 162. It is urged, therefore, that the elements of loitering may be established by suspicious circumstances of which a citizen may not be cognizant and for which he may bear no responsibility. The Attorney General asserts, on the other hand, that § 240.35(6) can be distinguished from the sttatutes disapproved in *Papachristou*, *Palmer*, and *Smith*, because it "focuses upon specifically criminal conduct."

[10] *See generally* Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L.J. 1 (1960); Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603 (1956); Lacey, Vagrancy and Other Crimes of Personal Conditions, 66 Harv. L. Rev. 1203 (1953).

On its face, the statute discloses that "loiter[ing]" "remain[ing]" or "wander[ing]" in an unspecified place for an unspecified period of time without apparent reason can establish the first element of the offense. Surely a citizen who sought to conform his conduct to this provision would be unable to discern whether he risked criminal responsibility by taking a leisurely stroll, by sitting briefly on a park bench, or by seeking shelter from the elements in the doorway of a building.

The second substantive component of the statute is established by "circumstances which justify suspicion that [a person] may be engaged or about to engage in crime."[11] Yet, such "circumstances" may reflect the "whim of the policeman," *People* v. *Berck, supra*, 347 N.Y.S.2d at 38, rather than the conduct of an individual who happened to "wander" into the midst of the police, thereby creating the "hazard of being prosecuted for knowing but guiltless behavior." *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964). With nothing more, the "suspect" is hardly offered a bright line test for distinguishing the licit from the illicit.

Moreover, there are insufficient guidelines for enforcement and thus § 240.35(6) does not pass constitutional muster on this ground as well. The section permits arrests and convictions for suspicion or for possible crime based on circumstances less compelling than the reasonable and articulable factors which are required to sustain a mere on-the-scene frisk. *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Sibron* v. *New York*, 392 U.S. 40 (1968). It has been noted, and we agree, that the section could lend itself to the abuse

[11] As construed by the New York courts, the third condition of § 240.35(6) ("upon inquiry . . . defendant refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes") is not in fact a substantive element of the crime of loitering. Rather, the police inquiry is a "procedural condition" to arrest under the statute. *People* v. *Schanbarger*, 24 N.Y.2d 288, 291-92, 300 N.Y.S.2d 100, 101-02 (1969). *See People* v. *Berck*, *supra*, 347 N.Y.S.2d at 36 n. 2.

of pretextual arrests of people who are members of unpopular groups or who are merely suspected of engaging in other crimes, without sufficient probable cause to arrest for the underlying crime.[12] For example, in *People* v. *Williams*, 55 Misc. 2d 774, 286 N.Y.S.2d 575 (New York City Crim. Ct. 1967), the court commented that:

> these defendants are 41 of a group of alleged prostitutes who have been arrested and detained 2500 times for disorderly conduct and loitering in New York City since August 18th . . . . This Court of its own knowledge is aware that except for a few isolated instances where defendants pleaded guilty, the disorderly conduct cases were dismissed. In many instances, "the girls" were arrested after 11:30 P.M., too late to be arraigned, night court had been adjourned, then kept overnight in a cell. In the morning they were brought to Court and released because the offenses for which they had been arrested could not be proven to have been committed by them.

286 N.Y.S.2d at 577. *See* Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim. L. Bull. 205, 220-28 (1967); Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L.J. 1, 8 (1960); Lacey, Vagrancy and Other Crimes of Personal Condition, 66 Harv. L. Rev. 1203, 1219-24 (1953). *See also Winters* v. *New York*, 333 U.S. 507, 540 (1948) (Frankfurter, *J.*, dissenting).

To the extent the statute can be interpreted to support dragnet, street-sweeping operations absent probable cause of actual criminality, it conflicts with established notions

[12] We note, however, that there is no suggestion that Newsome was the target of a pretextual arrest and search, or that the officers failed to act in good faith.

of due process. *Beck* v. *Ohio, supra; Henry* v. *United States, supra; Wong Sun* v. *United States,* 371 U.S. 471, 479-82 (1963). Even in the absence of purposeful circumvention of traditional standards for lawful arrests, § 240.35(6) confers discretion that is simply too unbridled to satisfy due process standards. The "infirmity" lies in the imprecision of the statute, not the subjective intent of enforcement officials. The Supreme Court has noted, "[w]ell-intentioned prosecutors and judicial safeguards do not nuetralize the vice of a vague law." *Baggett* v. *Bullitt, supra,* 377 U.S. at 373.[13]

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[13]The defects which we find in § 240.35(6), and which were discussed by the New York Court of Appeals in *Berck*, are neither obscure nor manifestations of recent shifts in the law. The commentary accompanying § 240.35(6) in the New York Penal Law indicates that the subdivision was a new and "controversial" amendment. Subdivision 6 created a catch-all category to supplement other loitering provisions which specify with greater precision the conduct they proscribe. *See* N.Y. Pen. L. § 240.35. The court in *Berck* commented that subdivision 6 was patterned after § 250.12 of Tentative Draft 13 of the Model Penal Code. The American Law Institute abandoned that formulation, however, in its Proposed Official Draft precisely because the vagueness of the tentative draft was subject to the abuse of arrest and searches without probable cause. ALI, Model Penal Code, § 250.6, Proposed Official Draft at 227 (1962).

Even before the New York Court of Appeals struck down § 240.35(6), the lower state courts had experienced difficulty in interpreting the statute in a consistent manner to ensure even-handed enforcement. Three lower courts had declared § 240.35(6) unconstitutional (*People* v. *Bambino,* 69 Misc. 2d 387, 329 N.Y.S. 2d 922 (Nassau County Ct. 1972); *People* v. *Villanueva,* 65 Misc. 2d 484, 318 N.Y.S.2d 167 (Long Beach City Ct. 1971); *People* v. *Beltrand,* 63 Misc. 2d 1041 (New York City Crim. Ct.) *aff'd on other grounds,* 67 Misc. 2d 324, 324 N.Y.S.2d 477 (App. Term 1971)); two had upheld the statute in the face of constitutional challenges (*People* v. *Taggart,* 320 N.Y.S.2d 671 (Suffolk Dist. Ct. 1971); *People* v. *Strauss,* 320 N.Y.S.2d 628 (Nassau Dist. Ct. 1971)); and one court has expressed doubts over its constitutionality although it did not reach the ultimate question (*People* v. *Williams,* 55 Misc. 2d 774, 286 N.Y.S.2d 575 (New York City Crim. Ct. 1967)).

Applying the standards enunciated in *Papachristou, Palmer,* and *Smith,* we conclude, as did the New York Court of Appeals in *Berck,* that § 240.35(6) contravenes the Due Process Clause of the Fourteenth Amendment not only because it fails to specify adequately the conduct it proscribes, but also because it fails to provide sufficiently clear guidance for police, prosecutors, and the courts so that they can enforce the statute in a manner that is consistent with the Fourth Amendment. Accordingly, Newsome's arrest pursuant to that section was unlawful.

IV. Search Incident to Arrest

Having concluded that Newsome's arrest pursuant to an unconstitutional statute was unlawful, we turn our attention to whether the search conducted incident to that arrest was also unlawful. For the reasons set forth, we conclude that the search in this case was constitutionally invalid, that the evidence thus seized must be suppressed and that, accordingly, the writ should issue.

Searches incident to arrest comprise a well-recognized exception to the warrant requirement of the Fourth Amendment. This exception, of course, does not reduce the level of constitutional protection because it retains the safeguard that probable cause must exist to justify the intrusiveness of the underlying arrest. *United States* v. *Robinson,* 42 U.S.L.W. 4055 (Dec. 11, 1973); *Gustafson* v. *Florida,* 42 U.S.L.W. 4068 (Dec. 11, 1973). Indeed, in recently expanding the permissible scope of searches incident to lawful arrests, the Supreme Court placed great reliance on the existence of probable cause to arrest as a justification for its holding. *United States* v. *Robinson, supra,* 42 U.S.L.W. at 4060; *Gustafson* v. *Florida, supra,* 42 U.S.L.W. at 4069-70.

Newsome, however, was searched incident to arrest for the violation of a statute which we have found unconstitutional in the main because it substituted mere suspicion for probable cause as the basis for arrest. Thus, we consider his warrantless search constitutionally defective because to sustain its validity would emasculate the essential Fourth Amendment protection which only probable cause provides.[14] Accordingly, we affirm.

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[14] We disclaim any intention to fashion a per se principle that all searches incident to arrests under statutes later declared unconstitutional are invalid.

Supreme Court, U. S.
FILED
JUL 10 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1627

LOUIS J. LEFKOWITZ, Attorney General
of the State of New York,

Petitioner,

against

LEON NEWSOME,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

Petition for Writ of Certiorari Filed April 29, 1974,
Writ of Certiorari Granted June 17, 1974.

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Relevant Docket Entries—District Court.

72C-453 UNITED STATES OF AMERICA ex rel. LEON NEWSOME vs. BERNARD J. MALCOLM

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
4- 6-72	PETITION FILED FOR A WRIT OF HABEAS CORPUS.	1 JS
4- 6-72	ORDER FILED for the filing of petition, etc., without prepayment of costs, etc.	2
4- 7-72	ORDER TO SHOW CAUSE FILED WITH PROOF OF SERVICE THEREON why a writ of habeas corpus should not be granted, etc. (returnable April 10, 1972 at 10:00 A.M.—Room 2)	3
4- 7-72	Petitioner's Memorandum of Law filed.	4
4- 7-72	NOTICE OF APPEAL FILED (from the order denying relator's request for an order staying all state proceedings, etc.)	5
4- 7-72	Instructions mailed to Attorney for relator herein on preparation of record on appeal, etc. MRB	
4- 7-72	Copy of Notice of appeal was on this day mailed to Clerk, U.S.C.A. MRB	
4- 7-72	Copy of Notice of appeal was on this day mailed to Corporation Counsel, Municipal Bldg., State of N.Y., etc. MRB	
4-10-72	Before BRUCHHAUSEN, J. Hearing on order to show cause for a writ of habeas corpus, etc. adjourned to May 1, 1972 at 10:00 A.M.	

Relevant Docket Entries—District Court.

Date	Filings—Proceedings	Amount Reported in Emolument Returns
5- 1-72	Before Bruchhausen, J. Case called and adjourned to May 22, 1972.	
5-22-72	Before Bruchhausen, J. Case called. Hearing on order to show cause, etc. Motion argued. Decision reserved.	
5-23-72	By Bruchhausen, J. Memorandum and Order filed. It is ordered that the Petition be and it is hereby Dismissed. Copies hereof have been forwarded to the attorneys for the parties. (See Memo. and Order)	6 JS
5-25-72	Notice of Appeal filed (from order entered on the 23rd day of May, 1972)	7
5-25-72	Copy of Notice of appeal was on this day mailed to Clerk, U.S.C.A. MRB	
5-25-72	Copy of Notice of appeal was on this day mailed to Corporation Counsel, Municipal Bldg., State of N.Y. MRB	
5-25-72	Copy of instructions on preparation of record on appeal was on this day mailed to Robert Kasanof, Esq., The Legal Aid Society, 119 Fifth Avenue, New York, N.Y. 10003 MRB	
8- 8-72	Motion pursuant to Rule 24(a)(2) with Verified Answer annexed filed.	8
8- 8-72	Memorandum of law for the Atty General of the State of N.Y. intervenor-respondent filed.	9

Relevant Docket Entries—District Court.

Date	Filings—Proceedings	Amount Reported in Emolument Returns
8- 8-72	Record on appeal certified and given to Sandra Sadowitz for delivery to Court of Appeals. Receipt in file.	
8-11-72	Receipt returned from C/A acknowledging receipt of record, filed. (C/A No MR 5293)	10
5-21-73	Certified copy of order (U.S.C.A.) filed. Treating letter of counsel of the appellee as a motion to remand this action to the U.S.D.Court, E.D.N.Y. for a decision on the merits. Upon consideration whereof it is Ordered that this action be and hereby is remanded to the U.S.D.Court, E.D.N.Y., for a decision on the merits. MRB	11
6- 8-73	All documents in this matter were on this day returned to this office. Receipt signed and mailed to Clerk, U.S.C.A. MRB	
6-25-73	Before Bruchhausen, J. Case called. Submitted. Decision reserved.	
7-12-73	By Bruchhausen, J. Memorandum and Order filed. Ordered that the writ should be issued. It is so ordered. (See Memo., etc.) Copies have been forwarded to the attorneys for the parties. (See Memo., etc.)	12
8-13-73	Notice of Appeal filed (of Intervenor-Respondent, Louis J. Lefkowitz, Atty., Gen., State of N.Y., from orders entered herein on July 12, 1973)	13

Relevant Docket Entries—District Court.

Date	Filings—Proceedings	Amount Reported in Emolument Returns
8-13-73	Instructions on preparation of record on appeal were on this day handed personally to a representative of said respondent, etc. MRB	
8-13-73	Copy of Notice of Appeal was on this day mailed to Clerk, U.S.C.A.	
8-13-73	Copy of Notice of Appeal was on this day mailed to Robert, Kasanof, Esq., Atty., for Petitioner, etc. MRB	
8-13-73	Copy of Notice of Appeal was on this day mailed to District Atty., Queens County, 125-01 Queens Blvd., Kew Gardens, N.Y., etc. MRB	
9-24-73	Memorandum of Petition filed.	14
9-24-73	Memorandum of Law filed for Intervenor-Respondent herein.	15
9-24-73	Memorandum of (Reply) petitioner filed.	16
9-24-73	Letter of Stanley Neustadter, Assistant Atty., In Charge, etc. dated July 5, 1973 addressed to Bruchhausen, H.	17

Relevant Docket Entries—Court of Appeals.

Case No. 73-2413

U.S.A. v. Attorney General of the State of New York

Date	Filings—Proceedings
8-14-73	Filed copy of notice of appeal (Atty. Gen. of the State of N.Y.)
9-24-73	Received docket fee
9-24-73	Filed record (original papers of District Court)
11- 7-73	Filed motion to dismiss appeal, p/s
11-27-73	Filed motion to extend time to file brief and appendix of appellant, p/s
11-27-73	Filed order denying motion to dismiss appeal; appellant to file brief and appendix by 12-11-73; appellee's brief to be filed by 12-25-73; argument of appeal to be heard first week in January 1974
12-11-73	Filed appendix, p/s
12-11-73	Filed brief, appellant, p/s
12-26-73	Filed brief, appellee, p/s (4 copies)
1-11-74	Argument heard (by: Kaufman, Smith, and Feinberg)
1-28-74	Judgment affirmed, Kaufman, CCJ
1-28-74	Filed judgment
4-16-74	Issued mandate (opinion and judgment)
5- 3-74	Filed notice of filing of petition for writ of certiorari (S.C. No. 73-1627)
6-24-74	Filed certified copy of order of Supreme Court granting petition for writ of certiorari (SC# 73-1627)

Petition for a Writ of Habeas Corpus.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

72 Civ. 453

UNITED STATES OF AMERICA *ex rel.* LEON NEWSOME,

Petitioner,

against

BERNARD J. MALCOLM, New York City Commissioner of Correction, JOHN J. CUNNINGHAM, Warden, New York City Correctional Center for Men, RICHARD NEWHALL, Deputy Warden, Queens Court Detention Pens,

Respondents.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

LEON NEWSOME, being duly sworn, deposes and says:

I will be incarcerated by the Respondents on April 11, 1972, when I surrender in Part 1E of the New York City Criminal Court, Queens County pursuant to a judgment of conviction rendered therein on May 7, 1970. I submit this verified petition in support of my application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

No prior application has been made by me in any federal court for a writ of habeas corpus; nor is there any other proceeding concerning my imminent detention currently pending in any state or federal court.

On May 7, 1970, I was convicted by the Criminal Court, Queens County, of loitering (N.Y. Penal Law § 240.35 [6]) after trial, and of attempted possession of dangerous drugs (N.Y. Penal Law § 220.05; 110.00) upon my plea of guilty. I was sentenced that day to an unconditional discharge on the loitering conviction, and to 90 days for the possessory charge.

Execution of sentence was immediately stayed pursuant to a certificate of reasonable doubt [pursuant to N.Y. Code of Crim. Proc. § 527] when I posted $100.00 cash bail on the date I was sentenced (May 7, 1970). The stay was extended and bail continued on two subsequent occasions in state court [Part 1E, Queens County Criminal Court, July 22, 1971 and December 1, 1971] at which I appeared; indeed, since the very inception of the charges against me, I have appeared in court at all times when my presence was required.

All state remedies having been exhausted, however, the stay of execution of sentence will expire on April 11, 1972, at which time I must, and will, surrender into the custody of the Respondents to commence service of the 90-day sentence which, upon information and belief, will be served at the New York City Correctional Center for Men on Rikers Island. No requests for further extending the stay of execution are pending in any state court.

My imminent custody is illegal because the conviction for attempted possession of drugs and the 90-day sentence imposed thereon is predicated upon evidence seized incidental to my arrest under the color of an unconstitutionally vague and overbroad statute purporting to prohibit "loitering . . . under circumstances which justify suspicion", an arrest which violated my rights to be free of unreasonable searches and seizures and to due process of law under the Fourth and Fourteenth Amendments of the United States Constitution.

A hearing held on April 7, 1970 on my motion to suppress evidence established the following facts, which are more

tully set forth in the accompanying memorandum of law:

On the evening of February 12, 1970, I entered the lobby of a City Housing Authority apartment house with an acquaintance.

Shortly after we arrived, a uniformed Housing Authority patrolman entered and quickly asked me what I was doing there. I told him, "I am not doing anything", and explained to him that I had just arrived. The officer then asked me for identification, but when I was unable to produce any, I was arrested for loitering. The officer then searched me and found a closed zippered pouch which he opened to find some heroin and hypodermic instruments. My friend was not arrested.

At the trial level, my assigned lawyer argued that the evidence was insufficient to convict me of loitering; that my arrest for loitering was unreasonable and was without probable cause; and that the loitering statute pursuant to which I was arrested was unconstitutional. These arguments were rejected, and the trial court denied my motion to suppress the evidence seized incident to the loitering arrest and found me guilty of the loitering charge as well.

The same arguments were raised on appeal to the Appellate Term, Second and Eleventh Judicial Districts. On June 21, 1971, that court reversed the loitering conviction, but held that there was probable cause to arrest me for loitering, affirming the order denying the motion to suppress evidence.

The opinion of the Appellate Term is not officially reported and is annexed as Appendix A; the order and judgment of affirmance is annexed as Appendix B.

Leave to appeal to the New York Court of Appeals was denied on July 14, 1971 by Associate Judge Breitel; a copy of the certificate denying leave to appeal is annexed as Appendix C.

The United States Supreme Court denied my petition for a writ of certiorari on February 22, 1972 [30 L. Ed. 2d 779, sub nom. *Newsome* v. *New York*].

WHEREFORE, I respectfully request that a writ of habeas corpus issue on the ground that the conviction pursuant to which I must serve a 90-day sentence to commence April 11, 1972, was predicated upon evidence seized incidental to an unlawful arrest under the color of an unconstitutionally vague and overbroad loitering statute in violation of my constitutional rights under the Fourth and Fourteenth Amendments.

(Petition verified by Leon Newsome April 6, 1972.
Verification Omitted in Printing.)

APPENDIX A.

Opinion of the Appellate Term.

Judgment of conviction unanimously modified on the law and facts by reversing the conviction of loitering and dismissing that charge, and, as so modified, judgment of conviction affirmed.

The evidence was insufficient to establish beyond a reasonable doubt defendant's guilt of loitering in violation of Section 240.35 of the Penal Law. Moreover, insofar as the information charged defendant with loitering, it was jurisdictionally defective (*People* v. *Schanbarger*, 24 N.Y.2d 288). However, there was probable cause to arrest defendant on that charge and the subsequent search disclosing the presence of narcotics and narcotic instruments on defendant's person was lawful (*Henry* v. *United States*, 361 U.S. 98, 102-103; *People* v. *Maize*, 32 AD2d 1031. Cf. *People* v. *Rosemond*, 26 NY2d 101; *People* v. *Peters*, 18 NY2d 238, 246-247, aff'd. 392 U.S. 401.

APPENDIX B.

At a term of the Appellate Term of the Supreme Court of the State of New York for the 2nd and 11th Judicial Districts, held in Kings County, on the 21st day of June, 1971.

Cal. No. 2(Q)
Feb./'71.

Present—Hon. William B. Groat,
Presiding Justice
" " Dominic S. Rinaldi,
" " John E. Cone,
Justices

The People of the State of New York,
Respondent,

vs.

Leon Newsome,
Appellant.

The above named Leon Newsome, the defendant herein, having appealed to this Court from judgments of the Criminal Court of the City of New York, County of Queens, rendered on the 7th day of May, 1970, convicting him of a violations of

Section 240.35 (6), Penal Law,
Section 110.00, Penal Law,

and imposing sentence as follows:

Section 240.35 (6) —Unconditional Discharge,
Section 110.00 —90 Days in New York City Reception and Classification Center.

and the said appeal having been argued by Mr. Stanley Neustadter, of counsel for the appellant, and argued by Mr. Thomas A. Duffy, Jr., of counsel for the respondent, and due deliberation having been had thereon;

It is hereby ordered and adjudged that the judgment of conviction so appealed from be, and the same is hereby, unanimously modified on the law and facts by reversing the conviction of loitering and dismissing that charge and, as so modified, judgment of conviction affirmed.

D S. R.
Justice, Appellate Term

APPENDIX C.

STATE OF NEW YORK

COURT OF APPEALS

Before: HON. CHARLES D. BREITEL, Associate Judge

CERTIFICATE DENYING LEAVE

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

LEON NEWSOME,
Defendant-Appellant.

Petition for a Writ of Habeas Corpus.

I, CHARLES D. BREITEL, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to § 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
July 14, 1971

CHARLES D. BREITEL
Associate Judge

* Stanley Neustadter, Esq.
Legal Aid Society
119 Fifth Avenue
New York, New York

Hon. Thomas J. Mackell
District Attorney, Queens County
125-05 Hoover Avenue
Jamaica, New York

Hon. Raymond J. Cannon, Clerk
Court of Appeals

* Briefs returned at office

Judgment of Crim. Ct., Queens Co. 5-7-70, affm. App. Term 2d & 10th 6-2.

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*Briefs returned at office.

Minutes of Plea of Guilty and Sentence.*

CRIMINAL COURT OF THE CITY OF NEW YORK
PART 2 B : COUNTY OF QUEENS

Docket: A 936

Charge: 240.35-6
220.45
220.05

Sentence

PEOPLE OF THE STATE NEW YORK

against

LEON NEWSOME,

Defendant.

May 7, 1970

125-01 Queens Blvd.
Kew Gardens, New York

Before: HON. ABRAHAM M. ROTH, Presiding Judge

APPEARANCES:

RALPH BEISNER, Esq.
Assistant District Attorney
For the People

MICHAEL JAY, Esq.
Legal Aid Society
For the Defendant

ESTER KALISH,
Court Reporter.

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* Handed up as an exhibit to the District Court and Court of Appeals and included in the appendix by agreement of the parties.

Minutes of Plea of Guilty and Sentence.

[2] Court Officer: Number 16 on the calendar, Leon Newsome, A936, charged with Section 240.35-6, 220.45, 220.05.

Mr. Jay: Your Honor, may we approach the bench?

(Off Record Discussion at Bench)

Mr. Jay: Your Honor, at this time, in view of the fact that the defendant was found guilty after trial on a charge of loitering and subsequent to that charged and as a result of that arrest, the defendant was subsequently charged with possession of drugs, and that there was a motion to suppress, the opinion of the Court was delivered on the same day as the trial for loitering, and the motion to suppress was denied on the basis that the arrest for the loitering was a lawful arrest, and at that time constitutional objections were made to the charge of loitering and the motion to suppress was had on the basis that were it [3] not for the fact that the loitering charge were unconstitutional, the drug charge would not have been sustained, would not be sustainable by the People. In view of the fact that the Criminal Court has seen fit to hold the defendant and deny the motion to suppress, the defendant at this time would withdraw any previously entered plea and enter a plea of guilty to 110—220.05 of the Penal Law, attempted possession of dangerous drugs. The defendant is so pleading in view of the fact that the motion to suppress was denied, and in view of the fact that the Criminal Court denied the motion to suppress, in view of the fact that the Court had already established a basis for lawfull arrest by the constitutionality of the loitering charge. For the record, your Honor, I have been—I have informed the [4] defendant of his right to appeal on the charge of loitering and on the motion to suppress.

The Court: Do you, defendant, now withdraw pleas of not guilty and offers to plead guilty to attempt possession of dangerous drugs to cover; is that correct?

Minutes of Plea of Guilty and Sentence.

Mr. Jay: That's correct.

Mr. Beisner: That plea is acceptable to the People, your Honor.

Judge Roth: Take his plea.

Mr. Beisner: Are you Leon Newsome?

Defendant: Yes, sir.

Mr. Beisner: You are charged with the crime of attempted possession of dangerous drugs in the fourth degree, in that on February 12, 1970, about 10:20 P.M.—in that on February 12, 1970, about 2:20 P.M., at 81-03 Hammils Boulevard, in the County of Queens, you did knowingly [5] and unlawfully have in your possession a quantity of heroin. How do you plead to those charges?

Defendant: Guilty.

Judge Roth: Are you pleading guilty to the charge of attempted possession of this dangerous drug, to wit, heroin? And that on February 12, 1970, the vicinity of 81-03 Hammels Boulevard, the County of Queens, City and State of New York, you had possession of that drug—you attempted to have possession of that drug; is that true?

Defendant: Yes.

Judge Roth: And nothing was [6] promised to you in reactually are guilty of that charge; is that so, sir?

Defendant: Yes.

Judge Roth: And before you plead guilty, you discussed this matter with your lawyer?

Defendant: Yes.

Judge Roth: And nothing was promised to you in regard to a sentence to induce you to plead guilty; is that correct?

Defendant: No.

Mr. Jay: Your Honor, for the record, I believe that the proper charge is possession of a dangerous drug in the 6th degree of the new amendment to the Penal Law.

Mr. Beisner: That's correct, 220.05.

Minutes of Plea of Guilty and Sentence.

Judge Roth: 220.05, I have that, dangerous drug in the 6th degree. I will so mark the papers.

Mr. Jay: Yes, your Honor.

Judge Roth: All right, defendant waives the 48 hours?

Mr. Jay: He does, your Honor.

Judge Roth: Any legal cause why sentence should not now be imposed?

Mr. Jay: There is none.

Judge Roth: Is there anything you wish to say?

[7] Mr. Jay: Yes, your Honor. The defendant informs me that he is gainfully employed. He is living with his mother; has been a resident in the State for a considerable amount of time. I'd ask the Court, in view of the fact the defendant has plead guilty, to be as lenient, as merciful as possible in imposing sentence.

Judge Roth: Anything else you wish to say in addition to what your lawyer has just said?

Defendant: No.

Judge Roth: Defendant is committed to the New York City Reception Center for a period of ninety days.

Mr. Jay: Your Honor, at this time, the defendant respectfully makes application to the Court for a certificate of reasonable doubt in view of the fact, your Honor, that we believe there are issues here that may be adjudicated upon by the Appellate [8] Term, in view of the fact that a constitutional question has been raised in reference to the loitering charge and the subsequent motion to suppress is based upon that loitering charge.

Judge Roth: The Court feels there is a question of law involved here, very serious question of law, with regard to the loitering charge. And in view of that, the Court will grant a certificate, and submit the order, I will sign it, of reasonable doubt.

Mr. Jay: Thank you, your Honor.

Judge Roth: All right.

Memorandum and Order of the District Court.

Court Officer: Put him back.

Judge Roth: Also fingerprint the defendant.

* * *

Certified to be a true and correct transcript of minutes in this case.

Esther Kalish,
Official Court Reporter.

Memorandum and Order of the District Court.

72 C 453

July 12, 1973

UNITED STATES DISTRICT COURT

Eastern District of New York

United States of America, ex rel. Leon Newsome,

Petitioner,

against

Bernard J. Malcom, New York City Commissioner of Correction, John J. Cunningham, Warden, New York City Correctional Center for Men, Richard Newhall, Deputy Warden, Queens Court Detention Pens,

Respondents,

Louis J. Lefkowitz, Attorney General of the State of New York,

Intervenor-Respondent.

Memorandum and Order

Memorandum and Order of the District Court.

BRUCHHAUSEN, D. J.

The petitioner applies for a writ of habeas corpus. He challenges the constitutionality of the State statute, which he was convicted of violating.

This Court by its memorandum and order dated May 23, 1972 dismissed the petition on the ground that the petitioner was not in custody within the meaning of the Habeas Corpus Statute, 28 U. S. C. 2241.

The Circuit Court of Appeals for the Second Circuit, by order dated April 26, 1973 remanded the action for a decision on the merits.

Thereafter, the Court of Appeals of the State of New York handed down its opinion in the case of The People & C., respondent v. Alan Berck, decided July 2, 1973 held that Section 240.35 (6)—Loitering is unconstitutional, that the that conviction should be reversed and the complaint dismissed.

It follows, therefore, that the writ should issue.

It is so ordered.

Copies hereof have been forwarded to the attorneys for the parties.

WALTER BRUCHHAUSEN
Senior U. S. D. J.

Decision of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 693—September Term, 1973.

(Argued January 11, 1974 Decided January 28, 1974.)

Docket No. 73-2413

UNITED STATES OF AMERICA ex rel.
LEON NEWSOME,

Petitioner-Appellee,

v.

BENJAMIN J. MALCOLM, New York City Commissioner of Correction, JOHN J. CUNNINGHAM, Warden, New York City Correctional Center for Men, RICHARD NEWHALL, Deputy Warden, Queens Court Detention Pens,

Respondents,

LOUIS J. LEFKOWITZ, Attorney General
of the State of New York,

Intervenor-Respondent-Appellant.

Before:

KAUFMAN, *Chief Judge,*
SMITH and FEINBERG, *Circuit Judges.*

Appeal from an order granting a petition for a writ of habeas corpus, pursuant to 28 U.S.C. 2254, entered in the United States District Court for the Eastern District of New York, Walter Bruchhausen, *Judge.*

Affirmed.

ROBERT S. HAMMER, Assistant Attorney General of the State of New York (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, on the brief), *for Intervenor-Respondent-Appellant.*

STANLEY NEUSTADTER, New York, New York (William J. Gallagher, The Legal Aid Society, on the brief), *for Petitioner-Appellee.*

KAUFMAN, *Chief Judge:*

This appeal presents the rare instance where by granting a writ of habeas corpus to a state prisoner we intrude less into local administration of criminal justice than if we were to follow the contrary course suggested by the state Attorney General. Judge Bruchhausen granted Leon Newsome's petition pursuant to 28 U.S.C. 2254 because the loitering statute under which Newsome was arrested has been declared unconstitutional by the New York Court of Appeals. Since Newsome is collaterally attacking a conviction not for loitering, but for a narcotics violation arising from evidence seized at the time of his arrest for loitering, his petition raises an interesting question of Fourth Amendment law. We agree with the New York Court of Appeals in its evaluation of the loitering statute and, because of the particular constitutional infirmities involved, are compelled to conclude that the writ should issue. We affirm.

I. FACTUAL BACKGROUND

The essential facts are not in dispute and can be related briefly. On February 12, 1970, New York City Housing Authority Policeman Warren J. Ungar and a fellow officer

responded to an anonymous telephone call "to the effect that someone was in the hallway" of a City Housing Authority dwelling at 81-03 Hammel Boulevard, Queens, New York. The patrolmen entered the building at approximately 10:20 p.m. and immediately approached two men—Leon Newsome and an unidentified companion—who were standing in the lobby near the main doorway. In response to Ungar's questions, Newsome said he had just entered the building. When Newsome was unable to produce identification, he was arrested for loitering (N.Y. Pen. L. 240.35(6)) and searched incident to that arrest. Patrolman Ungar placed Newsome against the wall and "went through the pockets." This search produced a closed black leather pouch in which Ungar found a functional hypodermic instrument and a glassine envelope later determined to contain 2 grains of heroin. Accordingly, Newsome was also charged with possession of dangerous drugs (N.Y. Pen. L. 220.05) and criminal possession of a hypodermic instrument (N.Y. Pen. L. 220.45).

After a brief nonjury trial before Criminal Court Judge Nicholas Tsoucalas on April 7, 1970, Newsome was convicted for loitering. Judge Tsoucalas immediately proceeded to conduct a hearing on Newsome's motion to suppress the evidence seized at the time of his arrest.[1] Newsoms raised and Judge Tsoucalas rejected the same claims at trial and on the motion to suppress: that the patrolmen did not have probable cause to arrest Newsome for loitering and that the loitering statute was unconstitutional and could not therefore serve as the basis for searches incident to arrests.

On May 7, 1970, the date scheduled for a trial on the drug charges, Newsome appeared before Judge Abraham Roth and withdrew his prior pleas of not guilty and pleaded guilty to the lesser charge of "attempted possession

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[1] Patrolman Ungar was the only witness at the loitering trial and the suppression hearing.

of dangerous drugs" (N.Y. Pen. L. 110(6)). He was sentenced immediately to 90 days in the City Reception Center, and received an unconditional release for the loitering conviction. The minutes of the May 7 proceedings clearly disclose Newsome's intention to appeal both the loitering conviction and, pursuant to N.Y. Code. Crim. P. 813-e,[2] the denial of his motion to suppress. Indeed, at the close of proceedings on May 7, Judge Roth granted a certificate of reasonable doubt (N.Y. Code. Crim. P. 527) because "there is a question of law involved here, very serious question of law, with regard to the loitering charge." On direct appeal to the Appellate Term, the loitering conviction was reversed for insufficient evidence; but, because the court found that probable cause existed to arrest Newsome for loitering, the search incident to that arrest was held valid and the drug conviction affirmed.[3] Leave to appeal to the New York Court of Appeals was denied and a petition for a writ of certiorari was denied *sub nom. Newsome* v. *New York*, 405 U.S. 908 (1972). The instant petition for a writ of habeas corpus was filed on April 6, 1972,[4] just five days before Newsome was to begin serving his 90 day sentence (imposition of which had been stayed pending appeal).[5]

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[2] Presently codified as N.Y. Crim. Proc. L. 710.70(2).

[3] The Appellate Term disposed of Newsome's appeal by issuing a summary order which is silent on the constitutional claims.

[4] Although Newsome has not pursued state avenues of collateral attack, his federal claims were presented to the state courts on direct appeal. He has, therefore, satisfied the exhaustion requirement, *Picard* v. *Connor*, 404 U.S. 270, 275 (1971), and the state makes no claim to the contrary.

[5] On May 23, 1972, Judge Bruchhausen dismissed the petition because Newsome was not "in custody" as required by 28 U.S.C. 2241. On appeal, we remanded by summary order (April 26, 1973) (72-1875) for a disposition on the merits, in light of the Supreme Court's holding on the custody question in *Hensley* v. *Municipal Court*, 411 U.S. 345 (1973).

On July 2, 1973, prior to Judge Bruchhausen's final disposition on the merits, the New York Court of Appeals in a well-reasoned opinion declared § 240.35(6) unconstitutional on its face because, among other infirmities, it was overly vague. *People* v. *Berck*, 32 N.Y.2d 567, 347 NYS2d 33 (1973), *cert. denied sub nom. New York* v. *Berck*, 42 U.S.L.W. 3352 (Dec. 11, 1973). On July 12, 1973, Judge Bruchhausen granted the writ.[6] The New York State Attorney General, who had not appeared in prior proceedings in this case, requested and was granted leave to intervene as a respondent on the present appeal.

II. Standing

As a threshold issue, the Attorney General raises the not unfamiliar claim that Newsome is without standing to pursue his underlying constitutional attacks on the drug conviction because those claims were waived when Newsome pleaded guilty. Ordinarily, it is true that an intelligent and voluntary guilty plea waives a defendant's right to trial and all claims of constitutional infirmities in the prosecution, which could have been raised at trial. *Tollett* v. *Henderson*, 411 U.S. 258 (1973); *McMann* v. *Richardson*, 397 U.S. 759 (1970); *Brady* v. *United States*, 397 U.S. 742 (1970).[7] But in *McMann* v. *Richardson*, the Supreme Court noted that an exception to the general waiver rule exists

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[6] Apparently because of a clerical error, Judge Bruchhausen's memorandum and order incorrectly indicate that Newsome is attacking a conviction for loitering. As noted above, the loitering conviction was vacated by the Appellate Term and the instant petition attacks the drug conviction.

[7] After a defendant pleads guilty on advice of counsel, "[t]he focus of federal habeas inquiry is the nature of the advice, and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity." *Tollett* v. *Henderson*, *supra*, 411 U.S. at 266.

where state law permits a defendant to retain his collateral claims after pleading guilty. 397 U.S. at 766. New York is one of those states which permit a defendant to appeal specified adverse pretrial rulings even though he subsequently pleads guilty. The operative statutory provision at the time Newsome pleaded guilty was N.Y. Code Crim. P. 813-c, which stated: "the order denying a motion to suppress evidence may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty."

We have characterized the New York procedure as "enlightened" for it permits a defendant whose sole defense is one of the specified constitutional claims, neither to suffer nor impose on the state the burden of going to trial simply to preserve his claim—a procedure which precipitated the enactment of § 813-c.[5] *See United States ex rel. Rogers* v. *Warden*, 381 F.2d 209, 214 (2d Cir. 1967). This new procedural device manifested obvious legislative determinations that trials are not to be encouraged in order to preserve a ground for appeal and that guilty pleas in such cases would aid in avoiding additions to beleagured trial calendars. Accordingly, the rule in this circuit is well established that a New York defendant who has utilized § 813-c in the state courts may pursue his constitutional claim on a federal habeas corpus petition, for "it would be anomalous if a defendant by scrupulously following a sanctioned and reasonable state procedure for preserving his federal constitutional claims on appeal in state courts, simultaneously waived his right to present these same claims to a federal court . . . because he was lulled into following state procedures." *Id.* at 214-15. *See United States ex rel. Stephen J.B.* v. *Shelly*, 430 F.2d 215, 217

[5] A companion section, 813-g (presently codified as N.Y. Crim. Proc. L. 710.20(3), 710.70(2)), permitted similar appeal from the denial of a motion to suppress an allegedly coerced confession.

& n. 3 (2d Cir. 1970); *United States ex rel. Molloy* v. *Follette*, 391 F.2d 231 (2d Cir. 1968).

The Attorney General, despite our clear pronouncements on the issue, contends again, as he did in *Molloy* and *Stephen J.B.*, that we should abandon the rule first announced in *Rogers* and close the avenue of federal habeas to state petitioners who have entered pleas of guilty under the circumstances we have recounted. Again, we reject this argument and reaffirm our view that where state law permits a defendant to plead guilty without forfeiting his appeals on collateral constitutional claims, it would be a trap to the unwary if a defendant who waived his right to trial in reliance on the state appeal procedures was thereafter precluded from pressing his federal constitutional claims in the district court. We believe, moreover, that were we to nullify the vitality of § 813-c and similar statutes for federal habeas purposes, most defendants with competent counsel would be dissuaded from pleading guilty and instead would proceed to trial for the sole purpose oof preserving claims for potential vindication on state review or federal habeas. The New York legislature passed § 813-c to prevent precisely this eventuality and federal courts should be reluctant to interfere with a state's administration of criminal justice, particularly when the result would be to add to its already congested criminal trial calendars. Accordingly, we refrain from confronting the state courts with a problem the legislature has attempted to ameliorate. We are of the view that the more appropriate forum for the Attorney General to express his dissatisfaction with § 813-c is the state legislature, not the federal courts.

As a final attack on our *Rogers-Molloy-Stephen J.B.* line of cases, the Attorney General contends that *Tollett* v. *Henderson*, *supra*, precludes all state prisoners who pleaded guilty from asserting collateral constitutional claims in federal habeas petitions—notwithstanding state

procedures which allow the defendant to retain those claims for purposes of *state* post-conviction remedies. In our view, *Tollett* does not stand for this proposition. In *Tollett* a Tennessee prisoner attacked his 25 year old conviction (entered after a guilty plea) for first degree murder on the ground that blacks were systematically excluded from the grand jury that indicted him. Tennessee had no procedure analogous to § 813-c for preserving constitutional claims after pleading guilty. The Supreme Court held that:

> after a criminal defendant pleads guilty on the advice of counsel he is not automatically entitled to federal collateral relief on proof that the indicting grand jury was unconstitutionally selected. The focus of federal habeas inquiry is the nature of the advice and voluntariness of the plea, not the existence of such of an antecedent constitutional infirmity.

411 U.S. at 266. To be sure, *Tollett* did not mention the exception cut out in *McMann*, and to which we have referred, for states which provide for the preservation of constitutional claims, but given the absence of this type of provision in Tennessee law, that question was not before the court in *Tollett* and repetition of the principle would have been superfluous. Accordingly, we refuse to undertake the hazardous task of elevating silence to the level of *stare decisis*.[9] When, as here, a defendant enters

[9] A split panel of the Ninth Circuit has apparently concluded that the exception noted in the *McMann* has not survived *Tollett*. *Mann* v. *Smith* (9th Cir. July 9, 1973) (71-1932), slip op. *petition for cert. pending* 42 U.S.L.W. 3363 (Dec. 18, 1973). The language to this effect in the *Mann* majority opinion must be considered dicta, however, since the petitioner had not in fact availed himself of state post-plea appellate procedures. *Mann*, *supra*, at 2 n. 1. The court commented that the failure to appeal in state court coupled with an apparent plea bargain was "more consistent with a relinquishment of his Fourth Amendment claims than an attempt to preserve them." *Id.* Although we do not agree with the Ninth Circuit's reading of *Tollett's* impact on *McMann*, our holding is not inconsistent with the determination that a defendant who fails to invoke available state procedures will not automatically benefit on federal habeas from the mere existence of those procedures.

(*footnote continued on following page*)

a plea of guilty and then follows acknowledged state procedures for preserving his claims, the guilty plea does not act as an automatic waiver.

III. Constitutionality of New York's Loitering Statute

Section 240.35(6) provides:

> A person is guilty of loitering when he: . . . Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes. . . .

We have noted that the New York Court of Appeals has already declared this provision unconstitutional on its face. *People* v. *Berck*, *supra*. In the instant proceeding, the Attorney General urges us, in effect, to instruct the state's highest court that its evaluation of a state statute was erroneous. Since the state court grounded its decision on the federal rather than the state Constitution, we must make an independent determination of the applicable federal standards. *See Townsend* v. *Sain*, 372 U.S. 293, 318 (1963). Accordingly, the question before us on this application for federal habeas corpus relief is whether the section violates due process. We conclude that it does.

(*footnote continued from preceding page*)

When § 240.35(6) became effective on September 1, 1967, it represented New York's formulation of a dragnet approach to the maintenance of public order that had its roots in feudal England and which has survived, despite considerable disapproval, in urban America. Originally conceived as a method to keep unemployed laborers from wandering between towns and terrorizing travelers, laws against vagrancy and loitering have been transformed into devices for preventing crime and for removing so-called nuisances—mobs and individual "undesirables"—from public places.[10] Despite the obvious governmental interest in preserving public order, a vagrancy-loitering statute will run afoul of the Constitution when its necessarily broad scope is stated in language so indefinite that it fails to:

> "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States* v. *Harris*, 347 U.S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. *Thornhill* v. *Alabama*, 310 U.S. 88; *Herndon* v. *Lowry*, 301 U.S. 242.

Papachristou v. *Jacksonville*, 405 U.S. 156, 162 (1972). Moreover, because the crime prevention components of loitering statutes are aimed at suspected or potential rather than incipient or observable conduct, they may conflict with the deeply rooted Fourth Amendment requirement that arrests must be predicated on probable cause. *Beck* v. *Ohio*, 379 U.S. 89 (1964); *Henry* v. *United States*, 361 U.S. 98 (1959). See *Papachristou* v. *Jacksonville*, *supra*; *Palmer* v. *Euclid*, 402 U.S. 544 (1971). Indeed, it has been suggested that:

> because the elements of the . . . offense are obscure even officers engaged in its good faith enforcement cannot gauge justification for . . . arrests consistently with Fourth Amendment principles.

Hall v. *United States*, 459 F.2d 831, 837 (D.C. Cir. 1972) (en banc).

[10] *See generally* Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L.J. 1 (1960); Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603 (1956); Lacey, Vagrancy and Other Crimes of Personal Conditions, 66 Harv. L. Rev. 1203 (1953).

Turning from our brief discussion of the history and purposes of vagrancy legislation to the specific statute in issue, we must scrutinize the New York statute, *Palmer*, ance with the standard enunciated in *Papachristou*, *Palmer*, and *Smith* v. *Florida*, 405 U.S. 172 (1972). Under the first prong of the vagueness test (*Papachristou* v. *Jacksonville*, *supra*, 405 U.S. at 162, *quoting*, *United States* v. *Harriss*, *supra*, 347 U.S. at 617) we must determine whether the statute's prohibitions are cast in terms sufficiently precise to give a reasonably intelligent person notice of the conduct that is proscribed. *See Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939). Newsome contends that the operative language is so indefinite that even a citizen who had "read and studied" the statute in an effort to regulate his behavior would be in a quandary. He suggests, moreover, that the linguistic imprecision is exacerbated because § 240.35(6) imposes criminal liability in the absence of criminal intent, a factor noted by the Supreme Court in *Papachristou*, 405 U.S. at 162. It is urged, therefore, that the elements of loitering may be established by suspicious circumstances of which a citizen may not be cognizant and for which he may bear no responsibility. The Attorney General asserts, on the other hand, that § 240.35(6) can be distinguished from the statutes disapproved in *Papachristou*, *Palmer*, and *Smith*, because it "focuses upon specifically criminal conduct."

On its face, the statute discloses that "loiter[ing]" "remain[ing]" or "wander[ing]" in an unspecified place for an unspecified period of time without apparent reason can establish the first element of the offense. Surely a citizen who sought to conform his conduct to this provision would be unable to discern whether he risked criminal responsibility by taking a leisurely stroll, by sitting briefly on a park bench, or by seeking shelter from the elements in the doorway of a building.

The second substantive component of the statute is established by "circumstances which justify suspicion that [a person] may be engaged or about to engage in crime."[11] Yet, such "circumstances" may reflect the "whim of the policeman," *People* v. *Berck*, *supra*, 347 N.Y.S.2d at 38, rather than the conduct of an individual who happened to "wander" into the midst of the police, thereby creating the "hazard of being prosecuted for knowing but guiltless behavior." *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964). With nothing more, the "suspect" is hardly offered a bright line test for distinguishing the licit from the illicit.

Moreover, there are insufficient guidelines for enforcement and thus § 240.35(6) does not pass constitutional muster on this ground as well. The section permits arrests and convictions for suspicion or for possible crime based on circumstances less compelling than the reasonable and articulable factors which are required to sustain a mere on-the-scene frisk. *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Sibron* v. *New York*, 392 U.S. 40 (1968). It has been noted, and we agree that the section could lend itself to the abuse

[11] As construed by the New York courts, the third condition of § 240.35(6) ("upon inquiry . . . defendant refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes") is not in fact a substantive element of the crime of loitering. Rather, the police inquiry is a "procedural condition" to arrest under the statute. *People* v. *Schanbarger*, 24 N.Y.2d 288, 291-92, 300 N.Y.S.2d 100, 101-02 (1969). *See People* v. *Berck*, *supra*, 347 N.Y.S.2d at 36 n. 2.

of pretextual arrests of people who are members of unpopular groups or who are merely suspected of engaging in other crimes, without sufficient probable cause to arrest for the underlying crime.[12] For example, in *People* v. *Williams*, 55 Misc. 2d 774, 286 N.Y.S.2d 575 (New York City Crim. Ct. 1967), the court commented that:

> these defendants are 41 of a group of alleged prostitutes who have been arrested and detained 2500 times for disorderly conduct and loitering in New York City since August 18th. . . . This Court of its own knowledge is aware that except for a few isolated instances where defendants pleaded guilty, the disorderly conduct cases were dismissed. In many instances, "the girls" were arrested after 11:30 P.M., too late to be arraigned, night court had been adjourned, then kept overnight in a cell. In the morning they were brought to Court and released because the offenses for which they had been arrested could not be proven to have been committed by them.

286 N.Y.S.2d at 577. *See* Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim. L. Bull. 205, 220-28 (1967); Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L.J. 1, 8 1960); Lacey, Vagrancy and Other Crimes of Personal Condition, 66 Harv. L. Rev. 1203, 1219-24 (1953). *See also Winters* v. *New York*, 333 U.S. 507 540 (1948) (Frankfurter, *J.*, dissenting).

To the extent the statute can be interpreted to support dragnet, street-sweeping operations absent probable cause of actual criminality, it conflicts with established notions

[12] We note, however, that there is no suggestion that Newsome was the target of a pretextual arrest and search, or that the officers failed to act in good faith.

of due process. *Beck* v. *Ohio, supra; Henry* v. *United States, supra; Wong Sun* v. *United States,* 371 U.S. 471, 479-82 (1963). Even in the absence of purposeful circumvention of traditional standards for lawful arrests, § 240.35(6) confers discretion that is simply too unbridled to satisfy due process standards. The "infirmity" lies in the imprecision of the statute, not the subjective intent of enforcement officials. The Supreme Court has noted, "[w]ell-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." *Baggett* v. *Bullitt, supra,* 377 U.S. at 373.[13]

[13] The defects which we find in § 240.35(6), and which were discussed by the New York Court of Appeals in *Berck*, are neither obscure nor manifestations of recent shifts in the law. The commentary accompanying § 240.35(6) in the New York Penal Law indicates that the subdivision was a new and "controversial" amendment. Subdivision 6 created a catch-all category to supplement other loitering provisions which specify with greater precision the conduct they proscribe. *See* N.Y. Pen. L. § 240.35. The court in *Berck* commented that subdivision 6 was patterned after § 250.12 of Tentative Draft 13 of the Model Penal Code. The American Law Institute abandoned that formulation, however, in its Proposed Official Draft precisely because the vagueness of the tentative draft was subject to the abuse of arrest and searches without probable cause. ALI, Model Penal Code, § 250.6, Proposed Official Draft at 227 (1962).

Even before the New York Court of Appeals struck down § 240.35(6), the lower state courts had experienced difficulty in interpreting the statute in a consistent manner to ensure even-handed enforcement. Three lower courts had declared § 240.35(6) unconstitutional (*People* v. *Bambino*, 69 Misc. 2d 387, 329 N.Y.S. 2d 922 (Nassau County Ct. 1972); *People* v. *Villaneuva*, 65 Misc. 2d 484, 318 N.Y.S.2d 167 (Long Beach City Ct. 1971); *People* v. *Beltrand*, 63 Misc. 2d 1041 (New York City Crim. Ct.) *aff'd on other grounds*, 67 Misc. 2d 324, 324 N.Y.S.2d 477 (App. Term 1971)); two had upheld the statute in the face of constitutional challenges (*People* v. *Taggart*, 320 N.Y.S.2d 671 (Suffolk Dist. Ct. 1971); *People* v. *Strauss*, 320 N.Y.S.2d 628 (Nassau Dist. Ct. 1971)); and one court has expressed doubts over its constitutionality although it did not reach the ultimate question (*People* v. *Williams*, 55 Misc. 2d 774, 286 N.Y.S.2d 575 (New York City Crim. Ct. 1967)).

Applying the standards enunciated in *Papachristou, Palmer,* and *Smith,* we conclude, as did the New York Court of Appeals in *Berck,* that § 240.35(6) contravenes the Due Process Clause of the Fourteenth Amendment not only because it fails to specify adequately the conduct it proscribes, but also because it fails to provide sufficiently clear guidance for police, prosecutors, and the courts so that they can enforce the statute in a manner that is consistent with the Fourth Amendment. Accordingly, Newsome's arrest pursuant to that section was unlawful.

IV. Search Incident to Arrest

Having concluded that Newsome's arrest pursuant to an unconstitutional statute was unlawful, we turn our attention to whether the search conducted incident to that arrest was also unlawful. For the reasons set forth, we conclude that the search in this case was constitutionally invalid, that the evidence thus seized must be suppressed and that, accordingly, the writ should issue.

Searches incident to arrest comprise a well-recognized exception to the warrant requirement of the Fourth Amendment. This exception, of course, does not reduce the level of constitutional protection because it retains the safeguard that probable cause must exist to justify the intrusiveness of the underlying arrest. *United States* v. *Robinson,* 42 U.S.L.W. 4055 (Dec. 11, 1973); *Gustafson* v. *Florida,* 42 U.S.L.W. 4068 (Dec. 11, 1973). Indeed, in recently expanding the permissible scope of searches incident to lawful arrests, the Supreme Court placed great reliance on the existence of probable cause to arrest as a justification for its holding. *United States* v. *Robinson, supra,* 42 U.S.L.W. at 4060; *Gustafson* v. *Florida, supra,* 42 U.S.L.W. at 4069-70.

Newsome, however, was searched incident to arrest for the violation of a statute which we have found unconstitutional in the main because it substituted mere suspicion for probable cause as the basis for arrest. Thus, we consider his warrantless search constitutionally defective because to sustain its validity would emasculate the essential Fourth Amendment protection which only probable cause provides.[14] Accordingly, we affirm.

[14] We disclaim any intention to fashion a per se principle that all searches incident to arrests under statutes later declared unconstitutional are invalid.

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of January, one thousand nine hundred and seventy-four.

Present: HON. IRVING R. KAUFMAN, *Chief Judge*,
HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,
Circuit Judges.

73-2413

UNITED STATES OF AMERICA ex rel. LEON NEWSOME,

Petitioner-Appellee,

v.

BERNARD J. MALCOM, New York City Commissioner of Correction, JOHN J. CUNNINGHAM, Warden, New York City Correctional Center for Men, RICHARD NEWHALL, Deputy Warden, Queens Court Detention Pens,

Respondents,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

Judgment of the Court of Appeals.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the intervenor-appellant.

A true copy.

A. Daniel Fusaro
Clerk

A. Daniel Fusaro
Clerk

by Vincent A. Carlin

Supreme Court U. S.
FILED
MAY 24 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1973 TERM

No. 73 - 1627

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Petitioner,

-against-

LEON NEWSOME,

Respondent.

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Leon Newsome, respondent herein, respectfully applies for leave to proceed in forma pauperis in connection with the filing of his brief in opposition to the petition for a writ of certiorari. Respondent's affidavit in support of the within application is annexed hereto.

Dated: May 21, 1974
New York, New York

Respectfully submitted,

STANLEY NEUSTADTER
WILLIAM E. HELLERSTEIN
The Legal Aid Society
119 Fifth Avenue
New York, New York 10003
Counsel for Appellant

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LEON NEWSOME, being duly sworn, deposes and says:

I am the respondent herein and make this affidavit in support of the within application to proceed in forma pauperis in connection with the filing of the brief in opposition to the petition for a writ of certiorari.

I am without funds to pay the cost of printing my brief in opposition and retaining counsel.

Throughout the prior proceedings in both the courts of New York and in federal court I was allowed to proceed as a poor person and was represented by the Legal Aid Society of New York. Such counsel have agreed to represent me in this Court without expense to me.

Leon Newsome
LEON NEWSOME

Sworn to before me this
22 nd day of May, 1974
Myra K. Wallach

MYRA K. WALLACH
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-5512825
Qualified in Queens County
Term Expires March 30, 1976

Supreme Court, U. S.
FILED
MAY 24 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1973 TERM

No. 73-1627

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

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-against-

LEON NEWSOME,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM E. HELLERSTEIN
STANLEY NEUSTADTER
THE LEGAL AID SOCIETY
119 Fifth Avenue
New York, New York 10003
[212] 677-4224
Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

1973 TERM

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Petitioner,

-against-

LEON NEWSOME,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 492 F.2d 1166 and is set forth as Appendix B to the petition; the opinion of the district court has not been officially reported and is set forth as Appendix A to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether a state defendant who duly exhausted state remedies by presenting his constitutional claim in timely accord with statutorily mandated state procedures after his guilty plea has properly preserved his claim for subsequent habeas corpus relief.

2. Whether respondent's arrest and search, under the color of a loitering statute already declared unconstitutional in both state and federal courts because of its vagueness and its authorization of suspicion arrests, violated his right to be free of unreasonable searches and seizures and deprived him of due process of law.

STATUTES INVOLVED

1. NEW YORK CODE OF CRIMINAL PROCEDURE, §813-c (eff. Apr.29,1962) provides, in pertinent part:

> A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property...claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move...for the suppression of its use as evidence
>
> * * *
>
> If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty.

2. NEW YORK PENAL LAW §240.35(6) provides in pertinent part:

> A person is guilty of loitering when he
>
> * * *
>
> (6) Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes;

STATEMENT

Respondent does not take issue with the statement of the case as set forth in the opinion below [492 F.2d at 1168-69].

REASONS FOR DENYING THE WRIT

Petitioner, having conceded throughout that respondent's constitutional claim was fully and properly litigated in timely accord with New York's statutory procedures, asserts that respondent's guilty plea ipso facto "waived" any opportunity for habeas corpus relief otherwise available to claimants who have fully exhausted state remedies [28 U.S.C.§2254].

The weakness of petitioner's argument is highlighted by New York Code of Criminal Procedure §813-c, which explicitly sanctioned judicial review of the order denying respondent's motion to suppress evidence even though the conviction was ultimately predicated upon respondent's subsequently entered plea of guilty.

Respondent, then, exhausted his state remedies in precisely the manner required by §813-c, a statute which, as the court below recognized, represents an "enlightened" legislative determination that "trials are not to be encouraged in order to preserve a ground for appeal [ie, an order denying a motion to suppress evidence] and that guilty pleas in such cases would aid in avoiding additions to beleaguered trial calendars". 492 F.2d at 1170.

We are thus unable to explain why petitioner would have this Court enervate a purely local* statutory effort designed to remedy New York's notoriously congested criminal calendars. Originally enacted in 1962 by a prescient legislature sensitively concerned with expeditious dispositions of criminal matters, section 813-c proved itself so successful along these lines that the legislature saw fit to retain the provision intact [as §710.70(2)] when, in 1971, it enacted an entirely new Criminal Procedure Law which otherwise wrought sweeping changes in many areas of the administration of criminal justice.

* California appears to be the only other jurisdiction which has analogous legislation. See Cal.Pen.Code §1538.5(m) [West,1973].

Indeed, §813-c has earned special commendation as a sound approach to crowded calendars by the A.B.A.'s MINIMUM STANDARDS RELATING TO CRIMINAL APPEALS, §1.3(b)(i) and Commentary thereto [Approved Draft,1970]:

> By so doing, New York avoids the unfortunate situation where the only reason a defendant goes to trial is to save the right to appeal denial of a pretrial motion to suppress evidence. Where the only litigable questions arise before trial, it is wasteful to force a sham trial in order not to have a forfeiture of appellate review.

Undaunted by the existence of New York's creative statute (whose constitutionality petitioner does not contest) and the continuing policy its reenactment reflects, petitioner presses his "waiver" argument which, moreover, ignores the particularly cruel injustice it would work upon the respondent in this case. As noted by the court below,

> "it would be anomalous if [respondent] by scrupulously following a sanctioned and reasonable state procedure for preserving his federal constitutional claims on appeal in state courts simultaneously waived his right to present those same claims to a federal court. . . because he was lulled into following state procedures". 492 F.2d at 1170.

Indeed, the record in this case bears grim witness to how petitioner's automatic "waiver" theory alters an 'enlightened' statutory provision into a trap for the unwary. After the motion to suppress was denied, respondent pleaded guilty to the contraband charge expressly announcing his intention to follow the post-plea procedures of §813-c as the means whereby he would seek to vindicate the constitutional claims he litigated unsuccessfully at the motion to suppress [492 F.2d at 1169].

It is thus rather disingenuous for petitioner to claim (at p.8 of the petition) that the Second Circuit has "sprung a trap on the State of New York". After all, it was the State of New York, not respondent, that enacted §813-c, upon which respondent

and his lawyer explicitly relied as the legitimate and proper method for the vindication of the constitutional claim notwithstanding the plea. Unlike respondent, petitioner does not, and cannot, show how New York relied to its detriment upon §813-c. Nor can petitioner deny the explicit nexus between the existence of 813-c (which he now seeks to disaffirm) and respondent's plea, which petitioner now so conveniently contorts into a "waiver" only after it has been secured.

Petitioner relies heavily upon quotations from various cases of this Court (cited at p.6 of the petition), but none of those cases involved a constitutional claim fully litigated before the plea under state statutory procedures designed to encourage that plea. The plea cases cited by petitioner were founded ultimately upon a requirement of candor and consistency of position between the defendant and the state. In those cases the defendants took the benefits of their guilty pleas (lesser sentences), but deliberately bypassed their opportunities to present their extant federal claims [eg,McMann:coerced confession; Tollett:systematic juror exclusion] to the state courts through the procedures the states had made available for that purpose. Thus it was thought unfair to the state to allow the defendants to do a complete about-face and raise the previously bypassed federal claim in collateral proceedings long after their pleas and sentences had been accepted by the state as final dispositions of their cases.

Here, it is the state that seeks the unfair advantage. By accepting the court-economy benefits that §813-c was designed to, and did, encourage, the state now does an untimely about-face in collateral proceedings, claiming for the first time that "plea-equals-'waiver'" to preclude respondent from litigating his properly preserved constitutional claim. Nothing in this Court's plea cases sanctions the inequitable advantage sought here by petitioner, and the court below was wholly correct in so holding.

Petitioner's assault on the decision below places itself on no firmer footing by positing a 'conflict' with Mann v. Smith, 488 F.2d 245(9th Cir.1973), cert. denied, ___U.S.___, 42 LW 3469(Feb.19,1974). As the Chief Judge accurately noted below [492 F.2d 1171,n.9], the 'conflict' is more apparent than real; for the defendant in Mann, unlike respondent, had not availed himself of California's limited post-plea appellate procedures, a critical distinction which has eluded petitioner.

We also note that when Mr. Mann sought certiorari, he, too, asserted a 'conflict' between the Ninth Circuit and the three extant Second Circuit decisions upon which the result in the instant case is predicated [U.S. ex rel. Rogers v. Warden, 381 F.2d 209(2d Cir.1967); U.S. ex rel. Molloy v. Follette, 391 F.2d 231 (2d Cir.1968); U.S. ex rel. Stephen J.B. v. Shelley, 430 F.2d 215 (2d Cir.1970)]. To whatever minimal extent the Ninth and Second Circuits might be deemed to hold discordant views, their discordance was fully evident to this Court when certiorari was sought, and recently denied, in Mann. We are unable to ascertain, nor has petitioner suggested, how this asserted 'conflict' was exacerbated by the decision below, or why this case is any more worthy of review than Mann.

In sum, prior to seeking habeas corpus relief, respondent properly exhausted his state remedies under the unique statutory procedures which New York has erected to ease its scandalous and equally unique criminal court backlogs. Petitioner was in no way prejudiced---in state or federal court---by those procedures, whose singularity divests this case of any nationwide significance and thus renders it undeserving of further review by this Court.

II.

When the New York Court of Appeals declared the catchall loitering subsection here involved facially unconstitutional [People v. Berck, 32 NY2d 567, cert.denied, 414 U.S. 1093(1973)], whatever controversy that might once have attended the issue was largely dissipated if not altogether eliminated; for the Second Circuit did nothing that had not already been done to the statute by the highest court of the state that enacted it.

Berck, of course, was predicated upon a trio of cases which ruled it unreasonable for a state to punish ostensibly innocent conduct under the rubric of a statute whose language gives inadequate notice that such conduct is unlawful. Papachristou v. Jacksonville, 405 U.S. 156(1972); Smith v. Florida, 405 U.S. 172 (1972); Palmer v. Euclid, 402 U.S. 544(1972).

Thus, the Second Circuit, following the sound lead of the New York Court of Appeals, concluded that the broadness and indefiniteness of the loitering subsection authorized wholly indiscriminate interference with the common public activity of ordinary citizens. Found equally defective was the subsection's attempt to criminalize a citizen's arousal of "suspicion" that he "may be engaged or about to engage in crime".

The court below also noted that statutes which are constitutionally defective for vagueness and overbreadth in the context of punishment can be simultaneously responsible for Fourth Amendment quandaries in the context of arrests effected under their aegis. The loitering subsection here placed respondent in precisely such a quandary, for the imprecision of the statute disabled him from conforming his behavior to its purported mandate and from thereby protecting himself from the police intrusion conducted under its color.

Respondent's arrest, moreover, for a crime whose basic element is "suspiciousness" was perforce an arrest on the basis of information far less probative of criminal involvement than was reasonable under the Fourth Amendment. The decision below stands simply and squarely for this primal tenet of search and seizure law; it hardly represents a novel development worthy of review, particularly when this Court has so recently denied review---also sought by this petitioner---in Berck, supra.

Finally, we note the significant absence from the petition of any assertion that the loitering statute is not vague and overbroad. Indeed, the only theory affirmatively advanced in support of the subsection is that it authorized an arrest of a citizen "who was up to no good" (Petition,p.10)---a legal standard no less vague, and no less violative of the Fourth Amendment, than the very statute it purports to sustain.

CONCLUSION

IT IS THEREFORE RESPECTFULLY SUBMITTED THAT THE PETITION FOR A WRIT OF CERTIORARI BE DENIED.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
STANLEY NEUSTADTER
Counsel for Respondent

May 20, 1974

Supreme Court, U. S.
FILED
JUN 4 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1627

LOUIS J. LEFKOWITZ, Attorney General
of the State of New York,

Petitioner,

against

LEON NEWSOME,

Respondent.

REPLY BRIEF FOR PETITIONER

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Petitioner, Pro Se
Office & P. O. Address:
Two World Trade Center
New York, N. Y. 10047
Tel. No. (212) 488-3394

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ROBERT S. HAMMER
Assistant Attorney General
of Counsel

In the

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REPLY BRIEF FOR PETITIONER

Respondent, in his brief, pp. 5-6, sets forth the implausible reasoning of the Second Circuit, in continuing to permit the challenge in the federal court of state guilty-plea convictions, which is directly contrary to the opinions of this Court in *McMann* v. *Richardson*, 397 U.S. 759 (1970) (reversing the Second Circuit) and *Tollet* v. *Henderson*, 411 U.S. 258 (1973). Clearly, the Ninth Circuit holding in *Mann* v. *Smith*, 488 F. 2d 245 (9th Cir. 1973), *cert. den.* —— U.S. ——; 42 U.S. Law Week 3469 (Feb. 19, 1974) is in line with the above opinions of this Court. The non-use by *Mann* of "California's limited post-plea appellate procedures" called a "critical distinction" by respondent, brief, p. 6, received no attention in both Ninth Circuit opinions in the result. Since *Mann* followed *Richardson* and *Tollett*, the denial by this Court of certiorari is not the path this

Court should follow in the instant case where the Second Circuit stubbornly adheres to the availability of federal habeas corpus following a guilty plea despite the above cases relying upon a "critical distinction" in *Mann* to which the Ninth Circuit paid no attention.

The case of *Blackledge* v. *Perry*, —— U.S. ——, #72-1660, 42 U.S. Law Week 4761 (May 20, 1974), further illustrates how respondent's position, brief, pp. 5-6, and the decision below, petition, pp. 7a-11a, rest upon an erroneous interpretation of this Court's rulings in *Tollett* v. *Henderson, supra; Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson, supra* and *Parker* v. *North Carolina*, 397 U.S. 790 (1970).

In *Perry*, this Court refined the rules set forth in *Tollett* and the *Brady* "trilogy" by permitting a defendant convicted upon his plea of guilty to raise in a habeas corpus proceeding a due process claim which barred the prosecution. However, it reiterated the doctrine that, except for claims related to the validity of the plea itself, federal habeas corpus was otherwise precluded, 42 U.S. Law Week at 4764.

The *Perry* decision further demonstrates the importance of the instant case. If the *Tollett* and *Brady* rules are not to be watered down then the Court below has, in a significant way, deviated from the law as set down by this Court. On the other hand, if the suggestion in the dissenting opinion, at 42 U.S. Law Week 4765, that a number of exceptions to these rules may exist is well taken, the instant case is an appropriate one for this Court to further explore an important unsettled area of the law.

The Second Circuit has acknowledged that the question raised here "is of large consequence both to the State of New York and to the federal courts." *United States ex rel. Molloy* v. *Follette*, 391 F. 2d 231, 232 (1968). This was before this court reversed that court's decision in *McMann*

which was then pending. The adherence of the court below to its view in contrast to that of the Ninth Circuit in *Mann* can scarcely be defended by the effort of respondent here to contend that the *Mann* court has not rendered a decision in direct conflict with that in the present case.

In view of the above cases we submit that this Court in the interest of the uniform administration of justice as to the availability of federal habeas corpus, should grant certiorari and summarily reverse the disposition below.

Dated: New York, N. Y., May 31, 1974.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Petitioner, Pro Se

Samuel A. Hirshowitz
First Assistant Attorney General

Robert S. Hammer
Assistant Attorney General
of Counsel

Supreme Court, U. S.
FILED
AUG 19 1974
MICHAEL RODAK, JR., CLERK

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LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Petitioner, Pro Se
Office and P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3394

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

IRVING GALT
ROBERT S. HAMMER
Assistant Attorneys General
of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1627

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Petitioner,

against

LEON NEWSOME,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported at 492 F. 2d 1166; the memorandum and order of the District Court for the Eastern District of New York is not yet reported. They appear in the Appendix at pages 19a and 17a, respectively.

Jurisdiction

The petition for a writ of certiorari was filed on April 29, 1974. Certiorari was granted on June 17, 1974, limited to Question "1" set forth in the petition.

The judgment of the Court of Appeals was entered on January 28, 1974. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

Question Presented

Whether a state defendant who pleads guilty may seek federal habeas corpus review of his conviction merely because the state has permitted him appellate review of a pre-trial motion to suppress, on constitutional grounds, the evidence that would have been offered against him had there been a trial?

Statutory Provisions Involved

28 U.S.C. § 2241(c) provides in pertinent part:

> "The writ of habeas corpus shall not extend to a person unless—
>
> • • • • • •
>
> "(3) He is in custody in violation of the Constitution or law or treaties of the United States; • • •"

N.Y. Code of Criminal Procedure* § 813-c provides:

> "A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.
>
> "If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.
>
> "If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Added L. 1962, c. 954, § 1, eff. April 29, 1962."

McKinney's Consolidated Laws of New York, Book 66, Part 3 page 78 (Supp. 1970).

* Effective September 1, 1971 the Code of Criminal Procedure was superseded by the Criminal Procedure Law, L. 1970, c. 996, 997, McKinney's Consolidated Laws of New York, Book 11A. The material contained in § 813-c has been recodified at N.Y.C.P.L. §§ 710.20(1) and 710.70(1)(2).

Statement of the Case

Respondent was arrested for loitering, N.Y. Penal Law § 240.35(6), in the lobby of a New York City Housing Authority building at 10:20 P.M. on February 12, 1970, after Housing Authority police were informed by an anonymous tenant that there was a suspicious person in the hallway (8a, 21a).

A search of respondent's person made at the time of the arrest revealed heroin and a set of "works," so that he was also charged in the Criminal Court of the City of New York, County of Queens, with possession of a dangerous drug, fourth degree, *id.*, § 220.05, and criminally possessing a hyperdermic instrument, *id.*, § 220.45, both Class A misdemeanors carrying a maximum of one year's imprisonment (*ibid.*).

The arresting officer testified at a pre-trial hearing on a motion to suppress the evidence pursuant to N.Y. Code of Crim. Pro. § 813-c that he had briefly observed respondent in the lobby. When approached by the officer and asked what he was doing, respondent had replied, "I am not doing anything", claiming to have just arrived. He was unable to produce any identification. His arrest and search followed, *ibid.*

Respondent was found guilty of loitering and the motion to suppress was denied. The Court rejected the claim that the arrest for loitering was made without probable cause and that the loitering statute was unconstitutional, *ibid.*

On May 7, 1970, respondent pleaded guilty to attempted possession of drugs and hypodermic charges. He was sentenced to 90 days imprisonment. He received an unconditional discharge on the loitering conviction (6a-7a, 21a-22a).

Respondent never served the jail sentence. A certificate of reasonable doubt was issued pursuant to former N.Y. Code of Crim. Pro. § 527 and petitioner was released on $100 cash bail pending appeal. He has remained at large ever since (7a, 22a).

An appeal was taken to the Appellate Term of the Supreme Court, Second and Eleventh Judicial Districts. On June 21, 1971 the judgment of the Criminal Court was modified by reversing the loitering conviction on the grounds of insufficient evidence and a defective information. However, the search incident to the loitering arrest which yielded the contraband was upheld on the basis that probable cause had existed to arrest respondent on that charge (8a-11a, 22a).

On July 14, 1971, leave to appeal to the New York Court of Appeals was denied by Hon. Charles D. Breitel, Associate (now Chief) Judge (11a-12a). Certiorari was denied *sub nom. Newsome* v. *New York*, 405 U.S. 908 (1972). The instant proceeding was then commenced in the District Court (1a).

The respondents named in the habeas proceeding never appeared. In view of his duty to defend the constitutionality of state statutes, N.Y. Executive Law § 71, the Attorney General of the State of New York requested and was granted leave to intervene as a respondent, see motion to intervene dated May 19, 1972.*

On May 23, 1972, the District Court dismissed the petition for a writ of habeas corpus for lack of jurisdiction on the ground that petitioner was not in custody within the meaning of 28 U.S.C. § 2241. A certificate of probable cause, leave to proceed in *forma pauperis* and assigned counsel were granted by the Court of Appeals. The case was held pending the decision of this Court in *Hensly* v. *Municipal Court*, 411 U.S. 345 (1973), and remanded in the light of that ruling (3a; 22a, fn. 5).

On July 12, 1973, the District Court granted petitioner's application for a writ of habeas corpus. The decision was based upon the fact that the contraband was seized incidental to an arrest on a charge of loitering, N.Y. Penal Law § 240.35(6), which was held unconstitutional in *People* v. *Berck*, 32 N Y 2d 567, *cert. den. sub nom. New York* v. *Berck*, 32 N Y 2d 567, 300 N.E. 2d 411, 347 N.Y.S. 2d 33 *cert. den. sub nom. New York* v. *Berck*, 414 U.S. 1093 (1973), (18a, 23a).

On appeal, the judgment of the District Court was affirmed. In its decision, the Court of Appeals for the Second Circuit adhered to its earlier rulings that federal habeas corpus was available to one in respondent's position although his conviction was based on a plea of guilty (23a-27a). It also held N.Y. Penal Law § 240.35 (6) uncon-

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* The opinion of the Court of Appeals erroneously states at page 23a that the petitioner appeared in this proceeding for the first time before that Court. In fact, he had intervened and appeared in the Appellate Term, in this Court in opposition to certiorari in *Newsome* v. *New York*, *supra*, as well as in the District Court in this case (2a).

stitutional, basing its decision largely upon that of the New York Court of Appeals in the *Berck* case (27a-33a).

On June 17, 1974 this Court granted certiorari as to the first question raised in the petition, relating to respondent's standing to seek review of his conviction by federal habeas corpus.

Summary of Argument

This Court in six recent decisions has formulated the rule that a state defendant who pleads guilty to a criminal charge may not subsequently ask a federal court to review his conviction via habeas corpus, except on the ground that the plea was invalid or the state lacked the power to bring him to trial, *Blackledge* v. *Perry*, 415 U.S. ——, 40 L. ed. 2d 628 (1974); *Tollett* v. *Henderson*, 411 U.S. 258 (1973); *North Carolina* v. *Alford*, 400 U.S. 25 (1970); *Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970); and *Parker* v. *North Carolina*, 397 U.S. 790 (1970). The instant case falls squarely within both the letter and the spirit of these decisions. Although the State of New York has provided for appellate review of the denial of pre-trial suppression motions, despite the defendant's subsequent plea of guilty, the prior resort to such a remedy may not be used as a general basis for federal collateral attack on such a conviction. The Legislative history of N. Y. Code of Crim. Pro. § 813-c, the nature of federal court jurisdiction as a limited grant of authority by the Congress, the fair, efficient administration of the habeas corpus remedy and, most importantly, the nature of a conviction based upon a plea of guilty fully support this Court's adherence to its prior decisions and a reversal of the judgment below.

ARGUMENT

A State judgment of conviction predicated upon a voluntary plea of guilty is not subject to federal habeas corpus review except as to the power of the State to bring the defendant to trial.

I

Respondent's plea of guilty was a voluntary act in the fullest sense of the word, and entered upon the advice of competent counsel, *cf. Boykin* v. *Alabama*, 395 U.S. 238 (1969). This Court has held that such a plea of guilty is

> "more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a judge or jury," *Brady* v. *United States*, *supra*, 397 U.S. at 748.

The weight and significance attached to a plea of guilty is such that this Court has barred collateral attack upon the conviction of a defendant who knowingly persevered in a plea of guilty despite his unwillingness to admit his guilt, *North Carolina* v. *Alford*, *supra*, 400 U.S. at 27.

More recently in *Tollett* v. *Henderson*, *supra*, this Court summarized the rule as follows:

> "We thus reaffirm the principle recognized in the *Brady* trilogy; a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea

> by showing that the advice he received from counsel was not within the standards set forth in *McMann*." (411 U.S. at 267).

This Court has refused to permit inquiry into a variety of alleged underlying constitutional defects: a statute which permitted the exercise of Fifth and Sixth Amendment rights only at the peril of exposure to a possible death penalty, *Brady* v. *United States, supra; Parker* v. *North Carolina, supra;* a coerced confession which, at the time, could not be tested except by going to trial, *McMann* v. *Richardson, supra;* exclusion of blacks from both grand and petit juries, *Tollett* v. *Henderson, supra,* and *Parker* v. *North Carolina, supra,* respectively. It is noteworthy that all of the defendants were charged with capital crimes* where the psychological pressure to avoid the risk of the death penalty was a significant factor. Only where the claim would, if sustained, have acted as a bar to the prosecution was a defendant convicted upon his plea of guilty permitted to litigate the matter on federal habeas corpus, *Blackledge* v. *Perry,* 415 U.S. ——; 40 L. Ed. 2d 628 (1974). However, in doing so, this Court reiterated the doctrine that, except for claims related to the validity of the plea itself, federal habeas corpus was otherwise precluded, *Id.,* 415 U.S. at ——; 40 L. Ed. 2d at 635-636.

Viewing the decision below in the light of these authorities, the fundamental error of the Second Circuit is immediately apparent: by failing to address itself to the issue of whether the right to pursue a constitutional claim as to the admissibility of evidence by federal habeas corpus could ever, as a matter of *federal* law, survive a plea of guilty, the court mistakenly treated a question of federal

* In *McMann* v. *Richardson,* defendant was accused of murder; in *Williams* and *Dash,* the other cases decided with it, the defendants were charged respectively with rape and robbery. 397 U.S. at 761-764.

subject matter jurisdiction as if it were one of the intent of the defendant to litigate or abandon a claim at his whim. This improper inquiry into whether the evidentiary claim had been "waived" by a plea of guilty was first stated in *United States ex rel. Rogers* v. *Warden,* 381 F.2d 209, 212-215 (2d Cir. 1967) and repeated in *United States ex rel. Molloy* v. *Follette,* 391 F.2d 231, 232 (2d Cir. 1968) and *United States ex rel. Stephen J.B.* v. *Shelly,* 430 F.2d 215, 217.* In the opinion below, this approach had become a casual assumption (24a-25a). Yet this rule established by the Court of Appeals was a radical deviation from the line of prior authority developed by the district courts of the Second Circuit and, indeed, by the Court of Appeals itself. This was perhaps, best articulated by Judge Bryan, writing in *United States ex rel. Mendez* v. *Fish,* 259 F.Supp. 146, 147-148 (S.D.N.Y. 1965), where, in an analysis similar to this Court's own recent decisions, he declared:

> Petitioner's imprisonment is not based upon an unconstitutional search and seizure or denial of due process. Any evidence obtained unconstitutionally was never used against her. Petitioner's imprisonment is based solely on her plea of guilty. * * * Consequently, although New York may provide petitioner with a statutory right to review a denial of a motion to suppress by appeal from a judgment of conviction based on a voluntary plea of guilty, there is no such constitutional right.

See also: *United States ex rel. Rosen* v. *Follette,* 66 Civ. 2756 (S.D.N.Y. 1966) aff'd on other grds 409 F 2d 1042 (2d Cir. 1969) cert. den. 398 U.S. 930 (1970); *United States ex rel. Cunningham* v. *Follette,* 66 Civ. 2428 (S.D.N.Y. 1966) aff'd on other grds 397 F 2d 143 (2d Cir. 1968) cert. den. 393 U.S. 1058 (1969). Cf. *United States ex rel. Jack-*

* The opinion of the Court of Appeals erroneously states (25a) that petitioner was a party in the *Stephen J.B.* case.

son v. *Warden*, 255 F.Supp. 33, 38 (S.D.N.Y. 1966) app. dism. April 3, 1967 (2d Cir. Dtct #30679), the only district court case which allowed consideration of the underlying claim, and only by characterizing the plea of guilty as being conditional in nature. The statement contained in *Rogers*, 381 F.2d at 213, that a voluntary plea of guilty is not, *ipso facto*, a waiver of a defendant's constitutional claims not only ignores that court's prior decisions in cases such as *United States ex rel. Marinaccio* v. *Fay*, 336 F.2d 272 (2d Cir. 1964) and *United States ex rel. Vaughn* v. *LaVallee*, 318 F2d 499, 500 (2d Cir. 1963) but is inconsistent with authorities cited on that very page. *United States ex rel. Glenn* v. *McMann*, 349 F2d 1018, 1019 (2d Cir. 1965) cert. den. 383 U.S. 915 (1966) and *United States ex rel. Boucher* v. *Reincke*, 341 F2d 977, 980-981 (2d Cir. 1965).

The Court below clearly erred and should have followed the lead of the Ninth Circuit in *Mann* v. *Smith*, 488 F. 2d 245 (9th Cir. 1973), *cert. den.* 415 U.S. 39 L. ed. 2d 490 (1974). Whatever question may have been left open in *McMann* v. *Richardson*, *supra*, 397 U.S. at 766, fn. 13, as to the availability of federal habeas corpus where a state appellate remedy exists to review the denial of a pre-trial suppression motion, has been resolved by the cases of *Tollett* v. *Henderson*, *supra*, and *Blackledge* v. *Perry*, *supra*. Nevertheless, we do not rely solely upon *stare decisis*. Even in the absence of these authorities, it is clear that the Court of Appeals erred, by exceeding its jurisdiction, by misinterpreting the legislative history of the statute at bar and by trespassing upon the proper prerogatives of the New York State Legislature to determine what policy is best for the State.

II

Perhaps the most pernicious effect of the opinion below is that it has enlarged federal habeas corpus jurisdiction on the basis of a state law which was without power to create such an additional federal remedy and, in the

process, has usurped the power of the Congress to prescribe the jurisdiction of the federal courts. It also gives legal sanction to the dubious proposition that federal law, in this case 28 U.S.C. § 2241(c) (3), need not be enforced uniformly. It has established one rule for the State of New York, while continuing to adhere to the strict waiver rule for those pleading guilty in federal courts, *Santana* v. *United States*, 477 F. 2d 721, 722 (2d Cir. 1973), and in the courts of those states that do not permit appellate review of pre-trial suppression motions once the defendant pleads guilty, *Bergin* v. *McDougall*, 432 F. 2d 935 (2d Cir. 1970).

The federal habeas corpus remedy is a creation of Congress, and is limited to an inquiry into the violation of federal rights, *Cupp* v. *Naughton*, 414 U.S. 141, 146 (1973). The right to appeal and scope of appellate review of a state criminal conviction exists as a matter of state law, *Griffin* v. *Illinois*, 351 U.S. 12, 21 (1956), Frankfurter, J., concurring; *McKane* v. *Druston*, 153 U.S. 684, 687-688 (1894). Only Congress has the authority to prescribe the jurisdiction of the lower federal courts, U.S. Const. Art. III § 1; *Palmore* v. *United States*, 411 U.S. 389, 400-401 (1973); *Glidden* v. *Zdanok*, 370 U.S. 530, 551, reh. den. 371 U.S. 854 (1962), and *Lockerty* v. *Phillips*, 319 U.S. 182, 187-88 (1943). In the absence of Congressional action, any attempt by the Legislature to consent by state statute to an enlargement of the jurisdiction of the district courts would be a nullity, *People's Bank* v. *Calhoun*, 102 U.S. (12 Otto) 256, 260-261 (1880); 1 Moore's Fed. Prac. ¶ 0.60[4], p. 608.

The Court of Appeals has thus chosen to disregard this example of the principle of divided sovereignty that is so fundamental to our system. The states always have the option of allowing a defendant more rights than the Constitution requires, *Lego* v. *Twomey*, 404 U.S. 477, 489 (1972). This does not automatically create a corresponding federal right.

Assuming, *arguendo*, that no jurisdictional bar existed to prevent the New York Legislature from effectively consenting to the enlargement of the scope of the federal habeas corpus remedy, clearly, this was never its intent.

New York Code of Criminal Procedure §§ 813-c and 813-g were enacted to bring New York into conformity with this Court's decisions in *Mapp* v. *Ohio*, 367 U.S. 643, reh. den. 368 U.S. 871 (1961) and *Jackson* v. *Denno*, 378 U.S. 368 (1964), and the New York Court of Appeals' ruling in *People* v. *Huntley*, 15 N Y 2d 72, 78, 204 N.E. 2d 179, 255 N.Y.S. 2d 838 (1965), which implemented *Jackson*. See Governor's approval memorandum, McKinney's 1962 N.Y. Sess. Laws, p. 3673, and Memorandum of State Council of Law Enforcement Agencies, 1965 N.Y. Leg. Annual, p. 52. In its recodified form, N.Y. Crim. Pro. Law §§ 710.10-710.70, provisions have also been made to allow pre-trial review of identifications, under the standards established by this Court in *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), *id.* § 710.20(5); see McKinney's N.Y. Crim. Pro. Law, Part 3, Practice Commentary p. 263 (1971).

The legislative history, both at the time of the original enactment and upon recodification, is silent as to whether the New York Legislature ever considered the possibility that the creation of an appellate remedy might give an unsuccessful defendant the eventual right to seek federal habeas corpus. However, it must be inferred that the Legislature never contemplated such result.

Beginning with its decision in *United States ex rel. Rogers* v. *Warden*, *supra*, 381 F.2d affd. 213 (2d Cir. 1967), the Court of Appeals has erroneously assumed that the exhaustion of the state appellate remedy under § 813-c negated any inference of waiver of the right to federal habeas corpus, citing this Court's decision in *Fay* v. *Noia*, 372 U.S. 391, 438 (1963). However this overlooks this insurmountable jurisdictional obstacle; that the defendant could

not choose to waive or not waive a right the Legislature never had the power to grant to him under the statute, page 11, *supra*.

III

The Court of Appeals has also taken upon itself the legislative authority to determine, without even a scintilla of proof in the record, that court calendars would become more congested; that defendants who lose pre-trial motions will choose to go through a needless trial rather than plead guilty, if they know that by doing so, they will be barred from federal habeas corpus (25a). This is the sheerest speculation.

It is just as likely, if not more likely, that the affirmance of the judgment below would have a deleterious effect on court calendars throughout the country:

While it appears that as of this moment only California, see *Mann* v. *Smith*, *supra*, and Wisconsin, see Wisc. Stat. Ann. § 971.13(10) [1971], have statutes that allow appellate review of suppression motions after a plea of guilty, such a statute, as the Court of Appeals recognized, can be beneficial to both the defendant and the state (24a). Any movement towards the general adoption of such laws ought not be impeded by placing additional burdens on the states (and incidentally on the federal courts) by opening the doors to additional collateral proceedings over issues which have been fully aired in a state appellate system. Any issue of national importance may still be resolved by this Court, 28 U.S.C. § 1257, as respondent herein attempted to do, *Newsome* v. *New York*, *supra*.

CONCLUSION

The judgment of the Court of Appeals should be reversed and this cause remanded with instructions that the petition for habeas corpus be dismissed.

Dated: New York, New York, August 9, 1974.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Petitioner, Pro Se

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

IRVING GALT
ROBERT S. HAMMER
Assistant Attorneys General
of Counsel

(56499)

Supreme Court, U. S.
FILED
SEP 18 1974
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1974

No. 73-1627

LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

v.

LEON NEWSOME,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

STANLEY NEUSTADTER
WILLIAM E. HELLERSTEIN
The Legal Aid Society
Criminal Appeals Bureau
119 Fifth Avenue
New York, New York 10003
Tel: [212] 677-4224

Attorneys for Respondent

WASHINGTON, D.C. • CLB PUBLISHERS • LAW PRINTING CO. • (202) 393-0625

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1627

LOUIS J. LEFKOWITZ, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Petitioner,

v.

LEON NEWSOME,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals is reported at 492 F.2d 1166, and is included in the Appendix at pp. 19a-34a; the memorandum of the District Court for the Eastern District of New York has not been reported and appears in the Appendix at pp. 17a-18a.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1974. The petition for a writ of certiorari was filed on April 29, 1974, and was granted on June 17, 1974. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does a state defendant's plea of guilty waive federal habeas corpus review of his conviction, even though under state law, he has been permitted review in the state appellate courts of the denial of his motion, on constitutional grounds, to suppress the evidence that would have been offered against him had there been a trial?

STATUTE INVOLVED

New York Code of Criminal Procedure §813-c provides:

> A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

> If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.
>
> If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Added L. 1962, c. 954, §1, eff. April 29, 1962.

McKinney's Consolidated Laws of New York, Book 66, Part 3 page 78 (Supp. 1970).

STATEMENT

State Court Proceedings

This case evolved from respondent's arrest for loitering (N. Y. Penal Law §240.35[6]) in the lobby of a City Housing Authority apartment house at 10:20 p.m. on the chilly evening of February 12, 1970. A search incident to this arrest resulted in the seizure of a small quantity of heroin and several hypodermic instruments, upon which added charges (N.Y. Penal Law §§220.05, 220.45) were predicated. Respondent moved to suppress the evidence on the grounds that it was seized incident to an unlawful arrest; on April 7, 1970, a hearing on the motion to suppress was joined with the trial on the loitering charge.

The arresting officer testified that he had received a telephone complaint "from an anonymous female to the effect someone was in the hallway" at an address in

Queens (4).[1] Proceeding to the address given, the officer observed respondent standing with another person in the lobby (4). The officer immediately (within 20 seconds, he estimated [7]) asked respondent what he was doing there, to which respondent replied: "I am not doing anything" (5), further explaining that he had just arrived (6).[2] Respondent then was asked for identification, and when he was unable to produce any, he was arrested for loitering (N.Y. Penal Law §240.35[6]) and searched incident to that arrest (6). Respondent's companion was not arrested.

Counsel argued that the evidence was insufficient to support a loitering conviction; that respondent's arrest for loitering was unreasonable in that there can be no probable cause to arrest for loitering a citizen who was observed simply standing for 20 seconds in the lobby of a multiple dwelling; and that the statute pursuant to which respondent was arrested was unconstitutional. The court rejected these arguments (12, 13, 21).

Respondent was found guilty of loitering as charged and the court denied the motion to suppress the evidence which was seized during the search incidental to the loitering arrest.

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[1] References in parentheses are to minutes of hearing and trial dated April 7, 1970, which shall be made available to the Court upon request. The minutes of plea and sentence, dated May 7, 1970 have been included in the Appendix (13a-17a).

[2] The officer did not recall petitioner telling him that he had entered the lobby to get out of the cold (7). National Weather Service records indicate that temperature readings of 31° were taken in Central Park at both 10 and 11 p.m. on the night of the arrest, which occurred at 10:20 p.m.

On May 7, 1970, respondent pleaded guilty to attempted possession of drugs (N.Y. Penal Law §220.15, 110.00) to cover the possessory charges. He was sentenced to an unconditional discharge on the loitering conviction and to a 90-day term for the possession conviction.

The arguments raised by trial counsel at the trial and hearing were raised on appeal to the Appellate Term. That court reversed the loitering conviction, but held that there was probable cause to arrest for loitering, affirming the order denying the motion to suppress.

Leave to appeal to the New York Court of Appeals was denied on July 14, 1971, by Associate Judge Breitel.

This Court denied a petition for a writ of certiorari on February 22, 1972 (405 U.S. 908 *sub. nom. Newsome v. New York*).

Federal Court Proceedings

On April 6, 1972, respondent filed an application for a writ of habeas corpus in the United States District Court for the Eastern District of New York (72 Civ. 453). The petition reiterated the claim, previously raised in state court, that the arrest under the color of the loitering statute, allegedly an unconstitutional enactment, was invalid and the evidence seized incident thereto should therefore have been suppressed.

The district court (Bruchhausen, J.) dismissed the petition on jurisdictional grounds in an unreported memorandum and order dated May 23, 1972 which held that petitioner was not "in custody" for federal habeas corpus purposes (App. 18a).

The court of appeals granted a certificate of probable cause, appointed counsel, and issued a stay of

proceedings on July 5, 1972. Though briefs were timely filed, the matter was held in abeyance pending this Court's determination of the "custody" issue, which was eventually resolved by *Hensley v. Municipal Court* (411 U.S. 345 [1973]). Accordingly, the panel summarily remanded the matter on April 26, 1973 to the district court for a determination of the merits. Upon the remand Judge Bruchhausen granted the writ; petitioner's appeal to the court of appeals resulted in an affirmance on January 28, 1974 (492 F.2d 1166) [App. 19a-34a].

Petitioner then sought certiorari on two issues, including the substantive issue upon which habeas relief had been granted. On June 17, 1974, this Court granted the writ, but specifically limited the grant to the procedural question presented, as set forth above at p. 2.

SUMMARY OF ARGUMENT

Petitioner, having conceded throughout that respondent's federal constitutional claim was fully and properly litigated in timely accord with New York's statutory procedures [N.Y.C.C.P. §813-c], asserts that respondent's guilty plea *ipso facto* "waived" the habeas corpus relief which Congress has made available as a matter of right to any claimant who, like respondent, has duly exhausted state remedies [28 U.S.C. §2254]. This assertion was rejected below, the court correctly concluding that granting the writ would "intrude less into local administration of criminal justice than if we

were to adopt the contrary course suggested by [petitioner]" [App. 20a]

The states, of course, are free to devise procedural methods [*Mapp v. Ohio*, 367 U.S. 643, 659 n. 9 (1960)], such as §813-c, for litigating federal constitutional claims; and federal courts have always been advised to accord substantial deference to the integrity of any state procedural device which reflects a legitimate state interest. *Henry v. Mississippi*, 375 U.S. 443 (1965). New York has found it preferable to allow an appeal following a guilty plea rather than have a defendant waste everyone's time lest he suffer appellate forfeit of the only issue of any significance to prosecution and defense: the constitutional admissibility of evidence. In furtherance of this preference the New York legislature has preserved for post-plea appellate review an order denying a motion to suppress. By equating a plea with a "waiver", however, petitioner ignores the operative effects of §813-c upon the litigants–defense and prosecution–who proceed under its terms.

More important, petitioner's assertion of "waiver" is inconsistent with the rationale underlying such plea-related habeas cases as *McMann v. Richardson*, (397 U.S. 759) and *Tollett v. Henderson*, (411 U.S. 258): the state has a justifiable expectation that finality has attached to criminal proceedings predicated upon a counselled plea of guilty where no issues, other than the constitutional validity of the plea itself, are thereafter cognizable in state court. By denying federal court access to those who have so pleaded and by insulating such convictions against federal habeas corpus

attack, this Court's plea cases, utilizing the legal construct of "waiver", legitimized and protected the states' expectations of finality because reasonable state procedural rules (and the counselled defendants' failure to avail themselves of them) made those expectations *justifiable*.

Implicit in this Court's plea cases, however, is the corollary that where the state does *not* have a justifiable expectation of finality, the habeas corpus statute requires the doors of federal court to remain open for vindication of properly preserved and exhausted federal constitutional claims. In light of the enactment of §813-c, New York's expectation of finality is no more justifiable following a plea than following a trial; by enacting the statute, the state has chosen to divest itself of a justifiable expectation of finality where, as here, those statutory procedures have been followed and the constitutional claim litigated under its alluring aegis. In terms of the availability of habeas corpus relief, respondent's plea is, in a word, irrelevant; it "waived" only his state-court trial. The only "waiver" in this case is New York's: its voluntary and counselled enactment of §813-c has relinquished its prerogative to claim that respondent's guilty plea terminated litigation of his constitutional claim.

On the other hand, respondent, who followed state procedures, obviously cannot be said either to have deliberately bypassed them or to have relinquished the constitutional rights the state's procedures were designed to vindicate expeditiously. To rule otherwise would undermine state legislative policy, subvert the exhaustion requirement of §2254 by making resort to

sanctioned state procedures a trap, and, on this record, unfairly penalize respondent for his explicit and well-founded reliance upon §813-c as a method, approved since 1962 by the state and since 1967 by the Second Circuit, for litigating and preserving his federal claim for habeas corpus review.

ARGUMENT

THE STATE, BY SANCTIONING APPELLATE REVIEW OF PRE-PLEA LITIGATION OF CONSTITUTIONAL CLAIMS, ABANDONED ITS EXPECTATION THAT RESPONDENT'S GUILTY PLEA INVESTED A FINALITY TO THAT LITIGATION; RESPONDENT, WHOSE GUILTY PLEA "WAIVED" ONLY HIS STATE-COURT TRIAL, AVAILED HIMSELF OF THE STATE-APPROVED PROCEDURES TO FULLY EXHAUST STATE REMEDIES, AND THUS PROPERLY PRESERVED HIS CONSTITUTIONAL CLAIM FOR THE HABEAS CORPUS RELIEF GRANTED BELOW.

I.

In most jurisdictions, the only way to preserve a Fourth Amendment claim for state appellate review is to go to trial, interpose an objection to the constitutional admissibility of the evidence, and pursue an appeal. In such jurisdictions, a guilty plea either forfeits the issue or leaves it unlitigated and thus, under state procedural rules, precludes subsequent state

appellate review of any Fourth Amendment claim the defendant might otherwise have been able to pursue on appeal had he chosen to go to trial. Those states, as a matter of local procedural preference to attach finality to their criminal proceedings, have clearly announced to both prosecution and defense by decisional or statutory law that a guilty plea terminates further litigation of Fourth Amendment grievances.

New York,[3] however, has chosen to permit appellate review of Fourth Amendment questions even though a plea of guilty is interposed after the motion to suppress is denied, an innovation which has not gone unadmired.

Section 813-c has earned special commendation as a

[3]A New York defendant claiming to be aggrieved by an unconstitutional search and seizure may move for its suppression as evidence (§813-c). Since the determination of this motion will frequently be dispositive of the strength of the case available to both the prosecution and defense, the motion, except in unusual circumstances (§813-d[1]) must be made before trial has commenced; and regardless of the pre-trial determination, the trial judge is bound by it (§813-d[2]). A defendant, however, who makes no motion at all, or whose motion is not made in accord with the applicable provisions, is deemed to have waived any objection, both at trial and on any subsequent appeal, to the admissibility of the evidence he failed to take proper and timely steps to suppress (§813-d[4]). *People v. Friola*, 11 N.Y.2d 157 (1962). The order denying a motion to suppress is an intermediate ruling which will be reviewed if raised on the appeal from the conviciton. See *People v. Gibbs*, 21 A.D. 2d 980 (2d Dept. 1963). These general provisions are fairly representative of the procedural preferences which currently prevail by dint of statute or case law in all jurisdictions, including federal courts. Fed. Rule Crim. Proc. 41(3); *Lawn v. United States*, 355 U.S. 339, 353-54 (1958); *United States v. Clark*, 459 F.2d 977 (8 Cir. 1972).

sound approach to crowded criminal calendars by the American Bar Association's MINIMUM STANDARDS RELATING TO CRIMINAL APPEALS, [Approved Draft, 1970] §1.3(b)(i) and Commentary thereto:

> New York avoids the unfortunate situation where the only reason a defendant goes to trial is to save the right to appeal denial of a pre-trial motion to suppress evidence. Where the only litigable questions arise before trial, it is wasteful to force a sham trial in order not to have a forfeiture of appellate review.

Similar considerations led to the recent adoption of New York's approach as Rule 444(d) of the UNIFORM RULES OF CRIMINAL PROCEDURE [Approved Draft: August, 1974].

While New York was the first (813-c was enacted in 1962) to announce a local procedural preference for the avoidance of unnecessary trials and a concomitant willingness to forego the finality that generally attaches to criminal proceedings following a plea, other states have followed suit. The overall court-economy benefits of allowing post-plea appellate review of pre-trial motions to suppress were not lost on Wisconsin draftsmen; the adoption of W.S.A. §971.31(10) was heralded by that state's Judicial Council for the following stated reason:

> This subsection, based upon N.Y.C.C.P. §813-c, should reduce the number of contested trials since, in many situations, the motion to suppress evidence is really determiantive of the trial. 1970 Wisconsin Annotations, p. 2142

The Proposed Final Draft of the INDIANA CODE OF CRIMINAL PROCEDURE (September, 1972) has simi-

larly chosen to adopt New York's innovative and time-saving procedures [§35-2.1-4-5(2)(e)]; and California has a similar, though not identical, statute [Pen. Code §1538.5(m)].

Finally, the court of appeals (24a) reiterated the observations it had made in 1967, 1968, and 1970, that the statute was a beneficent and enlightened effort to avoid unnecessary trials and accompanying calendar backlogs, observations which subsequently met with the concurrence of the New York Legislature when, in 1971, it saw fit to retain the provision intact [as §710.70(2)][4] as part of an entirely new Criminal Procedure law which otherwise wrought sweeping changes in many areas of the administration of criminal justice.

New York's practice in implementing §813-c amplifies the statutory purpose and defines the plea-related expectations of all who function under its procedures. A New York defendant who, after pleading guilty, appeals the constitutional claim he litigated pursuant to 813-c will seek reversal on the ground that the conviction was predicated upon illegally seized evidence. If the appellate court finds the evidence to have been unconstitutionally seized, the conviction will be reversed. The order reversing the conviction (1) grants the motion to suppress; (2) vacates the plea; and (3) remits the case for further proceedings. See for example *People v. Torres*, 45 A.D.2d 185 (1st Dept. 1974). The appellate disposition upon reversal is based on the assumption, created by §813-c, that the plea was entered because the motion to suppress had previously been denied;[5] no separate or independent claim that the plea was "coerced" need be made in order to secure this three-pronged remedy. Moreover, the conviction will be reversed even though the evidence in question does not relate to the count of the indictment to which the plea was entered. *People v. Lakin*, 21 A.D.2d 902 (2d Dept. 1965). In a contraband case, such as respondent's, the nexus between the plea and the preceding denial of the motion is so obvious, that an appellate order of reversal will not even bother to remand for further proceedings: the charges are dismissed outright. See *People v. Stokes*, 32 N.Y.2d 202 (1973).

[4]While petitioner correctly points out (Pet. Br. 12) that published legislative history does not reveal the precise goals of the legislature, it is unlikely, to say the least, that the observations of the American Bar Association and the repeated laudatory comments of the Second Circuit's earlier cases eluded the drafters; it is similarly implausible that the court-economy benefits of §813-c and its successor were more apparent to the state of Wisconsin than to the drafters of the New York statute Wisconsin expressly chose as its model.

[5]Such were precisely the circumstances of respondent's plea, as the record so clearly indicates (14a). Indeed, the record, as well as the general trial and appellate practice in New York as described above, gives the lie to the fiction proffered by petitioner (Pet. Br. 9) that respondent's conviction "is not based upon an unconstitutional search and seizure" but is based "solely" on the guilty plea. In other constitutional contexts, this Court has not taken kindly to such fictions. See *North Carolina v. Pearce*, 395 U.S. 711, 721 n. 17 (1969). In any event, respondent has never alleged that his plea was involuntary, and petitioner's argument is thus quite beside the point.

In short compass, then, state practice under §813-c confirms the essential function of that statute in plea cases: to secure speedy appellate review of the constitutional issue litigated in timely accord with the statute's other procedural requirements; in such a context, the plea operates largely as a device whereby the constitutional issue can be litigated without resort to trial. Neither the legislature, the judiciary, the prosecution nor the defense expects the guilty plea to terminate further litigation of a properly-litigated pre-plea constitutional claim; in such cases, no one (except the petitioner at bar) entertains any expectation that the plea attaches finality to the constitutional litigation that preceded the plea. Rather, the statute leads a defendant to expect full review of his Fourth Amendment claim.

II.

Most states have procedural rules which reflect substantial distinctions between pleas and trials, with a trial being the exclusive manner in which constitutional claims are to be litigated lest they be forfeited for further review. New York, however, has legislatively chosen to encourage guilty pleas where possible, and, with a view toward obvious court-economy benefits, has dispensed with the formality of trial which other states require as the *sine qua non* for preserving constitutional claims for appellate review.

Undaunted by the existence of §813-c (whose constitutionality petitioner does not contest) and the continuing policy its 1970 reenactment reflects, petitioner advances only one objection to the availability of habeas corpus to respondent: his guilty plea. Petitioner seeks support in the general teaching of the *McMann* line of cases that a guilty plea represents a "break in the chain of events which has preceded it" and waives not only a trial but, "unless applicable law otherwise provides" [*McMann*, at p. 766], also waives the right to contest the admissibility of evidence the state might have used. In New York, however, a guilty plea is not a "break in the chain"; and analysis of *McMann* and its progeny demonstrates that their outcomes have been dictated by state procedural preferences, and the distinctive expectations of finality which flow from them, rather than by the talismanic significance, independent of those preferences, which petitioner seeks to attach to a counselled guilty plea.

In *Tollett v. Henderson* (411 U.S. 258 [1973]), 20 years after pleading guilty the defendant sought to litigate, collaterally and for the first time, the composition of the grand jury that had indicted him. Since state law (*State ex rel. Lawrence v. Henderson*, 433 SW2d 96, 101 [Tenn. Cr. App. 1968]) required such a claim to be raised before trial and the defendant not only failed to raise the claim but had pleaded guilty as well, the state courts ruled that he had thereby "waived" the claim. This Court refused to upset the state's expectation of finality as mirrored in its procedural preference for trial preservation of the claim:

> In order to obtain his release on federal habeas corpus under these circumstances, [the defendant who pleads guilty] must not only establish the unconstitutional discrimination in selection of

> grand jurors. He must also establish that his attorney's advice to plead guilty *without having made inquiry* into the composition of the grand jury rendered that advice outside the range of competence demanded of attorneys in criminal cases.
>
> *Tollett v. Henderson, supra*, 411 U.S. at p. 268 (emphasis added)

The same analysis prevailed in *McMann v. Richardson*, [397 U.S. 757 (1970)], where the defendants had pleaded guilty without any litigation of any issue whatever. Each defendant subsequently applied for, and was denied, state collateral relief on the claim that an unconstitutionally coerced confession preceded his guilty plea. The state denied relief to each on the basis of then governing state law:

> If a defendant desires to contest the voluntariness of his confession, he must do so by pleading not guilty and then raising the point upon the trial; he may not plead guilty and then, years later, at a time when the prosecution is perhaps unable to prove its case, assert this alleged constitutional violation. The issue as to whether the confession was illegally obtained is waived by the guilty plea.
>
> *People v. Nicholson*, 11 N.Y.2d 1067, 1068 (1962)

This Court protected the dual state interest—that the confession issue be litigated at a trial if at all, and that it would be unfair to the state to allow the issue to be litigated for the first time long after the plea—from future dilution via federal habeas corpus:

> For the defendant who considers his confession involuntary and hence unusable against him at trial, tendering a plea of guilty would seem a most

> improbable alternative. The sensible course would be to contest his guilty prevail on his confession claim at trial, on appeal, or, if necessary, in a collateral proceeding, and win acquittal, however, guilty he may be . . . a guilty plea in such circumstances is nothing less than a refusal to present his federal claims to the state court in the first instance—a choice by the defendant to take the benefits, if any, of a plea of guilty and then to pursue his coerced-confession claim in collateral proceedings. *McMann v. Richardson, supra*, 397 U.S. at p. 768.

Tollett and *McMann*, then, attached no independent significance to the plea in precluding habeas relief to those defendants. Their guilty pleas became relevant, and ultimately dispositive, only within the context of state procedural preferences for (1) trials as the method of litigating and preserving a constitutional issue; and (2) finality of convictions obtained against pleading defendants who, under state law, thereby bypassed the preferred procedure for litigating that claim.[6] In states with those preferences, a guilty plea is the kind of bypass that concretizes the state's expectation of

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[6] This is the mark missed by petitioner's assertions (Pet. Br. 11) that the Second Circuit has shown special grace to New York pleaders which is at variance with the forfeiture it applies to other pleaders seeking collateral relief, and thus has allowed the New York legislature to "enlarge" federal jurisdiction. There is no variance here at all, and the constant for the availability of collateral relief remains the habeas corpus statute exhaustion requirement and the waiver-deliberate bypass gloss it has acquired. What qualifies a defendant for federal relief is not the *nature* of the procedures the state has erected for the litigation and preservation of federal claims, but the proper and timely *employment* of those procedures.

finality upon which subsequent intrusion by way of habeas corpus is unfair and unjustified. The presence of counsel when the plea is entered lends a presumptive deliberateness to that bypass, and thus all that survives the plea for habeas relief is the competence of counsel's advice as to the forum to which the claim should first have been presented, and the closely related issue of the voluntariness of the plea itself.

Respondent, unlike the defendants in *Tollett* and *McMann*, followed the state procedural preferences of §813-c for litigating his constitutional claim; New York, unlike the states in *McMann* and *Tollett*, has dispensed with its expectation of finality by allowing respondent post-plea appellate review of that claim under §813-c. Thus neither of the interests which this Court protected in *Tollett* and *McMann* call out for protection here. The state's procedural interest of §813-c have already been vindicated by respondent's scrupulous adherence to its requirements. As for the state's finality interests, New York has legislatively abandoned them.[7]

Petitioner's "waiver" argument thus distills itself to the following proposition: a federal habeas "court"

[7] Just last Term, this Court held that a federal habeas corpus court will not protect the state's interest in finalizing a criminal proceeding against a double jeopardy claim, regardless of the state's procedural preference for litigating that issue at trial and regardless of the apparent finality the defendant's guilty plea ostensibly affixed to state proceedings. *Blackledge v. Perry*, ___ U.S. ___ 40 L.Ed.2d 628 (#72-1660). Certain claims, such as the state's constitutional power to try a defendant, survive a plea even though the state, unlike New York, has not legislatively abandoned its finality interests and even though the defendant had bypassed state remedies.

should afford New York's finality interests greater protection than the state legislature, for its own court-economy reasons, deems desirable. Petitioner can offer neither reason nor authority for such a dubious proposition, for Congress has enacted a habeas corpus statute which, by its very terms, requires federal reassessment of properly preserved constitutional claims–a reassessment which both supersedes and is independent of the state's final disposition of that claim. In this regard, we are hard-pressed to improve upon this Court's observation that:

> conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.
>
> *Fay v. Noia, supra*, 372 U.S. at p. 424.

III.

The theoretical weakness of petitioner's "waiver" argument and its misplaced reliance upon *McMann* and *Tollett* is matched by a corresponding callousness to the injustice the argument would work upon respondent. For the record in this case bears grim witness to how an automatic "waiver" conclusion alters an enlightened statutory provision into a trap for the unwary. After respondent's motion to suppress was denied, respondent pleaded guilty to the contraband charge expressly announcing his intention to follow the post-plea procedures of §813-c as the means whereby he would seek to vindicate the constitutional claim he litigated unsuccessfully at the motion to suppress (App. 14a);

even the judge who pronounced sentence recognized the lurking constitutional infirmities of the case and granted a "certificate of reasonable doubt" to stay execution of sentence while post-plea appellate remedies were pursued (App. 16a). Though petitioner ignores the inequitable predicament his "waiver" argument creates for respondent, the court of appeals could not:

> "it would be anomalous if [respondent] by scrupulously following a sanctioned and reasonable state procedure for preserving his federal constitutional claims on appeal simultaneously waived his right to present those same claims to a federal court because he was lulled into following state procedures" [App. 24a]

It is thus disingenuous for petitioner to insinuate (Pet. Br. 12) that the court of appeals, by honoring §813-c in federal court, has sprung a trap on the state legislature. After all, it was the legislature, not respondent, that enacted §813-c upon which respondent and his lawyer explicitly relied[8] as the legitimate

[8] The reliance ingredient is enhanced by another factor. The record shows that respondent's lawyer, like any competent lawyer in New York, knew that a plea did not waive state appellate review of a properly litigated Fourth Amendment claim. Presumably, he knew this simply from having read the text of §813-c which, at that time (May 7, 1970), was set forth in the 1969-1970 pocket-part supplement to McKinney's Code of Criminal procedure, Part 3. The case-law annotations to §813-c included synopses of *United States ex rel. Molloy v. Follette* (391 F.2d 231) and *United States ex rel. Rogers v. Warden* (381 F.2d 209), two Second Circuit cases holding that habeas corpus remedies were not waived by a plea under §813-c. There is no reason to believe that respondent's lawyer, who clearly was aware of §813-c, was not equally aware of these holdings when he counselled the plea.

and proper method for the vindication of the constitutional claim notwithstanding the plea. Petitioner, unlike respondent, does not—and cannot—show any detrimental reliance upon §813-c. Nor can petitioner deny the explicit nexus between the existence of §813-c (which he now seeks to disaffirm) and respondent's plea, which petitioner now contorts into a "waiver" only after it has been secured.

As this Court has pointed out, equitable principles are most germane to habeas corpus proceedings:

> "Habeas corpus has traditionally been regarded as governed by equitable principles. Among them is the principle that a suitor's conduct in relating to the matter at hand may disentitle him to the relief he seeks . . . We therefore hold that the federal habeas judge may in his discretion deny relief to any applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies."
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> *Fay v. Noia, supra*, 372 U.S. at p. 438

It is thus doubly ironic that petitioner relies so heavily on *McMann* and *Tollett*, for those cases were founded on *Fay's* requirement of candor and consistency of position between the defendant and the state.

In those cases, of course, the defendants took the benefits of their guilty pleas (lesser sentences) but deliberately bypassed their opportunities to present their extant federal claims to the state courts through the procedures the state had made available for that purpose. This Court thought it unfair to the state to allow those same defendants to do a complete about-face and raise the previously bypassed federal claims for the first time in collateral proceedings long

after the state had been lulled into accepting their guilty pleas as final dispositions of their cases.

Here, however, the roles have been reversed. It is the respondent who has been lulled into a false sense of security and it is the state that seeks the unfair advantage in federal proceedings. For in the courts of New York the state affixed no post-plea finality whatever to the constitutional claim respondent litigated in timely accord with §813-c, and opened its appellate doors for further litigation of such claims. Only when the claim reached the federal courthouse did the state—with the court-economy benefits of respondent's plea conveniently in hand—announce its change of heart, assert that "plea-equals-waiver", and declare that it had expected the plea to terminate further litigation of the claim. When a state has legislated an equation between a plea and a trial for purposes of litigating a constitutional issue,[9] the spirit of *McMann* and *Tollett* precludes renunciation of that equation for the sole expedient of preventing an otherwise qualified habeas claimant from securing the relief that Congress has mandated. Nothing in this Court's plea cases sanctions the inequitable advantage sought here by petitioner, and the court of appeals was wholly correct in so holding. Cf, *Raley v. Ohio*, 360 U.S.423 (1959).

[9]Analogous situations have occurred on direct appeals from federal convictions where, by stipulation with the U.S. Attorney and the district judge, the defendant pleaded guilty to the charges against him while preserving for appellate review the constitutional issue he litigated before the plea. On appeal, the courts have viewed the arrangements as enforceable plea-promises governed by *Santobello v. New York* (404 U.S. 257 [1972]), have felt duty-bound to honor the stipulation, and thus have considered the merits of the constitutional issues involved notwithstanding the guilty pleas. See, for example, *United States v. Mendoza*, 491 F.2d 534 (5 Cir. 1974) and *United States v. Cox*, 464 F.2d 937 (6 Cir. 1972); *accord*, *United States v. DeCosta*, 435 F.2d 630 (1 Cir. 1970); *United States v. Doyle*, 348 F.2d 715, 719 (2d Cir. 1965) [Friendly, J.]; compare *United States v. Clark*, 459 F.2d 977 (8 Cir. 1972).

IV.

Petitioner closes (Pet. Br. 13) with a suggestion, ungraced by logic, statute, or decisional authority, that a pleading defendant with a properly preserved constitutional claim ought be content with this Court's review under certiorari jurisdiction (28 U.S.C. §1257[3]) The suggestion overlooks both the habeas corpus statute and this Court's Rules, and thus ignores well-engrained distinctions between discretionary and mandatory redetermination of federal constitutional claims.

Rule 19, amplifying the terse jurisdictional grant of §1257(3), emphasizes the discretionary dimensions of certiorari, denials of which are, of course, not adjudications on the merits. *Sheppard v. Ohio*, 353 U.S. 910 (1956); compare *Ohio ex rel. Eaton v. Price*, 360 U.S. 246 (1960).

Congress, for its part, has refused to relegate an otherwise qualified habeas claimant to this Court's discretionary[10] jurisdiction, has explicitly recognized (in

[10]That the exercise of certiorari discretion can be unpredictable is aptly illustrated by this Court's varied responses to the "certworthiness" of the very issue accepted for review here; review was denied four months earlier to a petitioner raising the identical issue. *Mann v. Smith*, 488 F.2d, 245 (9 Cir. 1973), *cert. den.* 415 U.S. 932 (#73-892). Similar considerations induced this Court to dispense with a certiorari application as a required exhaustion step. *Fay v. Noia*, 372 U.S. 391, 435-437 (1963).

28 U.S.C. §2244[c]) that a certiorari application does not meet the needs of the habeas claimant, and accepts nothing less than an actual adjudication of the merits as a substitute for the federal review mandated by the habeas corpus statute. See *Neil v. Biggers*, 409 U.S. 188, 191 (1972). Finally, the absence of a right to have counsel assigned for the preparation of a certiorari petition [*Ross v. Moffitt*, ___ U.S. ___, 41 L.Ed.2d 341 (#73-786)] further undermines petitioner's equation of a mere attempt to invoke this Court's discretionary jurisdiction with the plenary redetermination of properly preserved federal constitutional claims which Congressional mandate has vested in the district courts.

What is noteworthy about petitioner's certiorari suggestion is that it delivers the conceptual coup-de-grâce to his entire argument, for it necessarily concedes that respondent's guilty plea is not a "waiver" of certiorari prerogatives. It is possible, of course, that the concession stems from this Court's past willingness to review via certiorari the merits of a constitutional claim litigated pursuant to §813-c notwithstanding a guilty plea. *Sibron v. New York*, 392 U.S. 40 45 n.2 (1968); accord, *Parker v. North Carolina*, 397 U.S. 790, 798 (1970).

Whatever its source, petitioner's concession exposes the basic fallacy of automatically equating a guilty plea with a "waiver" of federal review of constitutional claims regardless of the state procedural context of the plea. With respect to constitutional claims litigated pursuant to §813-c, we can see no reason why a guilty plea, conceded both by this Court (*Sibron, supra*) and

by petitioner (Pet. Br. 13) to be irrelevant within the discretionary jurisdictional ambit of certiorari, suddenly becomes a "waiver" within the mandatory jurisdictional ambit of habeas corpus.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

STANLEY NEUSTADTER
WILLIAM E. HELLERSTEIN
Attorneys for Respondent

Dated: New York, New York
September 3, 1974